FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING, PETITIONER,

vs.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1953.

CERTIORARI GRANTED OCTOBER 19, 1953.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING, PETITIONER,

vs.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Original	Print
Proceedings in U.S.C.A. for the District of Columbia Circuit		1
Joint appendix to appellant's brief		1
Amended complaint		1
Answer to amended complaint		4
Pretrial proceedings		5
Memorandum, Keech, J.		7
Findings of fact and conclusions of law		9
Judgment		10
Notice of appeal		11
Stipulation designating record		11
Order to transmit exhibit to Court of Appeals		12
Opinion, per curiam		13
Judgment		16
Designation of record		16
Clerk's certificate	(omitted in printing)	17
Order granting certiorari		18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 26, 1953.

—1118

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,417

TOM WE SHUNG, by His Next Friend, TOM WING, *Appellant*,

vs.

J. HOWARD MCGRATH, Attorney General of the United States, and WATSON B. MILLER, Commissioner of Immigration, *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEX

Amended Complaint 32
Answer to Amended Complaint 35
Pretrial Proceedings 36
Memorandum by Judge Keech 38
Findings of Fact and Conclusions of Law 40
Judgment 41
Notice of Appeal 42
Stipulation Designating Record 42
Order to transmit exhibit to Court of Appeals 42

AMENDED COMPLAINT

Filed June 10, 1950

The plaintiff respectfully alleges:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. A. 2201) and for Review under the Administrative Procedure Act (5 U. S. C. 1001, et seq.).

2. That Tom Wing is a citizen of the United States and an honorably discharged veteran of World War II, and is duly authorized to act as next friend of the plaintiff, Tom We Shung.

3. That the plaintiff, Tom We Shung is the blood son of the said Tom Wing.

4. That the plaintiff, Tom We Shung is an infant twenty years of age.

5. That the defendant, J. Howard McGrath, is Attorney General of the United States and is charged with the statutory duty to determine after appropriate hearings whether aliens are to be deported from the United States.

6. That the defendant, Watson B. Miller, is the Commissioner of Immigration and Naturalization and is in direct charge of the administration of the immigration laws under the Attorney General.

7. That Tom Wing sought the admission to the United States of his son, Tom We Shung, under the provisions of Public Law 271, 79th Congress (8 U. S. C. A. 232).

8. That on or about November 28, 1947, the plaintiff Tom We Shung presented himself for admission to the United States, and in January of 1948 and February of 1949, hearings were held before a board of special inquiry at San Francisco, California, which determined the said Tom We Shung was inadmissible to the United States on the ground that he had not established that he was the son of Tom Wing.

9. That permanent and regularly constituted boards of special inquiry are available and are stationed at San Francisco. That the board of special inquiry which presided over plaintiff's case was not composed of three immigration officials in the service of the Commissioner, but on the contrary and in violation of the applicable law and regulations was composed of two immigrant officials and a clerk-stenographer.

10. That the aforesaid board of special inquiry was subject to the control of a District Director at San Francisco and other officials who were and are engaged in investigatory functions.

11. That the aforesaid hearing was unfair and null and void and in violation of the provisions of the Administrative Procedure Act (5 U. S. C. 1004).

12. That the aforesaid board of special inquiry was not composed of hearing examiners appointed in conformity with the Administrative Procedure Act (5 U. S. C. 1010).

BLEED THROUGH — POOR COPY

13. That the aforesaid order denying the plaintiff Tom We Shung admission to the United States on the ground that he had not established that he was the son of Tom Wing was affirmed by the defendant Watson B. Miller and the Board of Immigration Appeals acting for the defendant, J. Howard McGrath.

14. That the plaintiff submitted in the administrative proceedings herein his own sworn testimony, the testimony of his father, Tom Wing, and a birth certificate in support of his claim that he was the blood son of Tom Wing.

15. That there was no affirmative evidence contrary to such testimony.

16. That the plaintiff established by substantial evidence in the aforesaid administrative proceeding that he was the blood son of Tom Wing.

17. That the finding of the defendants to the contrary was not supported by substantial evidence or by any evidence whatsoever.

18. That plaintiff Tom We Shung is the blood son of Tom Wing and is admissible to the United States under Public Law 271, 79th Congress (8 U. S. C. A. 232).

WHEREFORE plaintiff requests an order declaring that the hearing acorded the plaintiff before the board of special inquiry was unfair, null and void, and further declaring that the plaintiff Tom We Shung is the blood son of Tom Wing and is admissible to the United States under Public Law 271, 79th Congress (8 U. S. C. A. 232).

JACK WASSERMAN,
Attorney for Plaintiff,
501 13th St., N. W.,
Washington 4, D. C.

ANDREW REINER,
Of Counsel.

ANSWER TO AMENDED COMPLAINT

Filed Nov. 1, 1950

First Defense

The complaint fails to state a cause of action upon which relief may be granted.

Second Defense

The Court lacks jurisdiction over the subject matter.

Third Defense

Specifically answering the numbered paragraphs of the amended complaint, defendant admits, denies, and avers as follows:

1. Paragraph 1 of the amended complaint states conclusions of law which defendant is not required to admit or deny. Insofar as an answer may be required, the allegations are denied.

2. The allegations of Paragraph 2 are admitted.

3. The allegations of Paragraph 3 are denied.

4. The allegations of Paragraph 4 are admitted.

5. The allegations of Paragraph 5 are admitted.

6. The allegations of Paragraph 6 are admitted.

7. The allegations of Paragraph 7 are admitted, except that defendant denies that Tom We Shung is the son of Tom Wing.

8. The allegations of Paragraph 8 are admitted.

9. Defendant admits that permanent and regularly constituted boards of special inquiry are available and stationed in San Francisco. Defendant avers that the Board of Special Inquiry before which plaintiff appeared was a properly constituted board. The remaining allegations of Paragraph 9 are denied.

10. The allegations contained in Paragraph 10 are admitted.

11. The allegations of Paragraph 11 are denied.

12. The allegations of Paragraph 12 are admitted but defendant denies that Boards of Special Inquiry are required to be appointed in conformity with the Administrative Procedure Act.

13. The allegations of Paragraph 13 are admitted.

14. Defendant admits that plaintiff submitted in the administrative proceedings his sworn testimony, as well as the testimony of Tom Wing. Defendant denies that Tom Wing is the father of plaintiff and that a birth certificate was submitted. Defendant avers that a self-serving declaration which purported to be a certificate of plaintiff's birth was submitted.

15. The allegations of Paragraph 15 are denied. There are many inconsistencies in the testimony of plaintiff and of Tom Wing, which inconsistencies were sufficient to indicate that plaintiff was not the son of Tom Wing.

16. The allegations of Paragraph 16 are denied.

17. The allegations of Paragraph 17 are denied.

18. The allegations of Paragraph 18 are denied.

WHEREFORE, defendant demands that the complaint be dismissed with costs to the plaintiff.

PRETRIAL PROCEEDINGS

Filed Nov. 29, 1950

Statement of Nature of Case:

This is an action for declaratory judgment by which the plaintiff seeks two forms of relief: First, he seeks a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) declaring that he is the son of Tom Wing, an honorably discharged veteran of World War II and as such that he is admissible to the United States under Public Law 271, 79th Congress (8 U. S. C. A. 232); and second, for review under the Administrative Procedure Act and a declaratory judgment that the administrative hearing accorded him before a board of special inquiry was unfair and null and void because the board of special inquiry was not composed as required by the Immigration statute because its members were subject to the control of those engaged in investigatory functions, because the evidence of his relationship to his alleged father was established by substantial evidence, and the contrary was not established by substantial evidence, and finally because the hearing was not in accordance with the Administrative Procedure Act.

The parties stipulate that Tom Wing is a citizen of the

United States and an honorably discharged veteran of World War II and that the plaintiff seeks admission at San Francisco as the alleged son of Tom Wing.

It is further stipulated that permanent and regularly constituted boards of special inquiry are available and are stationed at San Francisco and that the board of special inquiry which presided over plaintiff's case was composed of two immigrant inspectors and a secretary who was a clerk-stenographer in the employ of the Immigration Service and who acted as the third member of the said board.

It is further stipulated that the board of special inquiry was not composed of hearing examiners appointed in conformity with the Administrative Procedure Act and that the aforesaid members of the board of special inquiry were subject to the control of the district director at San Francisco and other officials who were engaged in investigatory functions.

The plaintiff contends that he is the blood son of Tom Wing and that his hearing was unfair because of the reasons mentioned above.

The defendants contend that the plaintiff is not the son of Tom Wing and the hearing was properly conducted; that the board was property composed of immigration officials, and that compliance with the Administrative Procedure Act was not required by law.

Counsel for the plaintiff agrees to submit the plaintiff and his alleged father to a blood test to be performed by such medical laboratory or physician as may be mutually agreed upon or as shall be designated by this court or the trial court.

STIPULATIONS: By agreement of counsel for the respective parties, present in court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

BOLITHA J. LAWS,
Pre-Trial Justice.

Dated: November 29, 1951.

Attorneys authorized to Act:
JACK WASSERMAN, *Plaintiff;*
ROSS O'DONOGHUE, *Defendant.*

BLEED THROUGH POOR COPY

MEMORANDUM

Filed February 27, 1952

This is an action for a declaratory judgment under the Declaratory Judgment Act and for review under the Administrative Procedure Act in connection with the exclusion of a Chinese alien. The plaintiff in his complaint requests "an order declaring that the hearing accorded the plaintiff before the Board of Special Inquiry was unfair, null and void, and further declaring that the plaintiff Tom We Shung is the blood son of Tom Wing and is admissible to the United States under Public Law 271, 79th Congress (8 USC 232)."

The plaintiff contends that the hearing before the Board of Special Inquiry which heard his case was null and void for the reasons that the Board was improperly composed of two immigrant officials and a clerk-stenographer; that the Board was subject to the control of officials engaged in investigatory functions, in violation of Section 5(c) of the Administrative Procedure Act [5 USCA § 1004(c)]; and that the Board was not composed of hearing examiners appointed in conformity with Section 11 of the Act (5 USCA § 1010). Plaintiff further contends that the finding of the Board should be set aside under the provision of Section 10(e)(B)(5) of the Act [5 USCA § 1009(e)(B)(5)] because it was not supported by substantial evidence or any evidence whatsoever.

Even before enactment of Public Law 843, 81st Congress, which specifically exempted immigration proceedings from the hearing provisions of the Administrative Procedure Act, they had been held inapplicable to exclusion proceedings before a Board of Special Inquiry, since Section 7(a) of the Act [5 USCA § 1006(a)] specifically exempts from these provisions proceedings before "boards or other officers specifically provided for by or designated pursuant to statute."[1]

Since Section 10(e)(B)(5) is confined to hearings held pursuant to the Act, it would be inapplicable to the hearing

---

[1] *U. S. ex rel. Saclarides, et al.*, v. *Shaughnessy*, 180 F. 2d 687, 689.

here involved, even if Section 10 be held applicable to immigration proceedings.

Since the complaint presents an actual controversy between the alien and immigration officials over the plaintiff's eligibility under 8 USCA § 232 for admission to the United States, which enables the plaintiff to sek judicial review under the Declaratory Judgment Act (28 USCA § 2201),[2] it is not necessary to consider the applicability of the judicial review provision of the Administration Procedure Act.

Under the express provisions of the statute, the decision of the Board of Special Inquiry is final, when affirmed on administrative appeal, and is reviewable by the courts only when the administrative officers have manifestly abused the power and discretion conferred on them.[3]

The scope of review under the facts in this case—an exclusion case involving the attempted entry into this country by a Chinese alien—is therefore limited to a determination of (a) whether the statutory requirements have been complied with, and (b) whether there has been an abuse of discretion by the immigration authorities. This is so whether the plaintiff's action be considered under the Declaratory Judgment Act or under Section 10(e) of the Administrative Procedure Act.

I find that there has been compliance with the applicable statutory requirements, and that the Board of Special Inquiry was properly constituted. I further find that, even if it were not so constituted, no timely objection was made thereto, although the plaintiff was admittedly represented by counsel particularly experienced and competent in such matters, and that the point, if valid, is not now available.

The Act under which the Board of Special Inquiry is authorized and operates provides specifically that the concurrence of two of its members is sufficient for board action (8 USCA § 153). No challenge was made or is now made of the fact that two members of the Board were lawfully members thereof, and the record discloses that the Board found

---

[2] *McGrath* v. *Kristensen*, 340 U. S. 162, 169.

[3] *Tulsidas* v. *Insular Collector*, 262 U. S. 258, 263; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 543 .

unanimously that the applicant had failed to satisfactorily establish that he is the blood son of Tom Wing.

I further find that the hearing accorded the plaintiff was a fair one.

I have reviewed the entire record and not only find there was no abuse of discretion by the authorities, but conclude that the record adequately justifies the action taken. The record warrants the conclusion that the denial of admission was not based merely on minor discrepancies, but rather that the discrepencies, material or immaterial, were considered in connection with the entire record in determining the credibility of the plaintiff, his father, and his witness, and that the Board did not act arbitrarily in disbelieving the testimony offered in support of plaintiff's application for admission.[4]

I therefore find that the plaintiff's prayers should be denied, and the amended complaint be dismissed.

Counsel will please present appropriate findings of fact, conclusions of law, and judgment.

(Signed) R. B. KEECH,
Judge.

February 27, 1952.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed March 7, 1952

This case having come on for trial and the Court having considered the file of the case, and having heard argument of counsel, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff was born in China and sought admission to the United States, claiming to be the son of an American citizen who had acquired citizenship after plaintiff's birth.

2. A hearing was afforded plaintiff by a Board of Special Inquiry of the Immigration and Naturalization Service which was composed of two immigration inspectors and the

---

[4] *O'Connell ex rel. Kwong Han Foo* v. *Ward*, 126 F. 2d 615, 620.

clerk-stenographer in the employ of the Immigration and Naturalization Service. The Board concluded that plaintiff was not a son of a citizen of the United States.

Conclusions of Law

1. This Court has jurisdiction to review the determination of the Board of Special Inquiry under the provisions of the Declaratory Judgment Act, 28 U. S. C. 2201.

2. The scope of review under the facts in this case—an exclusion case involving the attempted entry into this country by a Chinese alien—is therefore limited to a determination of (a) whether the statutory requirements have been complied with, and (b) whether there has been an abuse of discretion by the immigration authorities. This is so whether the plaintiff's action be considered under the Declaratory Judgment Act or under Section 10(e) of the Administrative Procedure Act.

3. There has been compliance with the applicable statutory requirements by the officials of the Immigration and Naturalization Service and the Board of Special Inquiry was properly constituted.

4. Even if it were not properly constituted, plaintiff waived any objection thereto by failing to object to the constitution of the Board at the time of hearing.

5. Plaintiff received a fair hearing and there was no abuse of discretion by the authorities.

6. The evidence before the Board of Special Inquiry amply supports its conclusions.

Defendants are entitled to judgment.

R. B. KEECH,
Judge.

Dated: 3/7/52.

JUDGMENT

Filed March 7, 1952

This cause having come on for trial and the Court having found for the defendants, as more fully appears in its memorandum opinion filed herein, and its findings of facts

and conclusions of law, it is by the Court this 7th day of March, 1952,

Ordered that judgment be, and the same is hereby, ordered for the defendants.

R. B. KEECH,
Judge.

NOTICE OF APPEAL

Filed March 28, 1952

Notice is hereby given that Tom We Shung, by his next friend, Tom Wing, the plaintiff above named, hereby appeals from the judgment for the defendants entered on March 7, 1952

STIPULATION DESIGNATING RECORD

Filed April 4, 1952

It is hereby stipulated by and between the attorneys for the respective parties herein that the record on appeal consist of the following:

1. Amended Complaint.
2. Answer to Amended Complaint.
3. Pre-trial Memorandum.
4. Memorandum of Court.
5. Findings of Fact and Conclusions of Law.
6. Immigration File.
7. Judgment.
8. Notice of Appeal.
9. Stipulation designating record.

(S.) ROSS O'DONOGHUE,
Assistant U. S. Attorney.
(S.) JACK WASSERMAN.

ORDER AS TO EXHIBIT

Filed April 7, 1952

It is by the Court this 7th day of April, 1952, Ordered That the Immigration file of the plaintiff, heretofore filed

in this case, shall be transmitted to the Court of Appeals in its original form and shall not be photostated or otherwise reproduced.

WALTER M. BASTIAN,
Judge, United States District Court.

(2561)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11417

TOM WE SHUNG, by his next friend,
Tom Wing, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, and WATSON B. MILLER,
Commissioner of Immigration, APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided July 2, 1953

Mr. Jack Wasserman for appellant.

Mr. Lewis A. Carroll, Assistant United States Attorney, with whom *Messrs. Charles M. Irelan,* United States Attorney at the time of argument, *Ross O'Donoghue* and *William R. Glendon,* Assistant United States Attorneys at the time of argument, were on the brief, for appellees. *Messrs. Leo A. Rover,* United States Attorney, *Joseph M. Howard,* Assistant United States Attorney at time record was filed, and *William E. Kirk, Jr.,* Assistant United States Attorney at time brief was filed, also entered appearances for appellees.

Before WILBUR K. MILLER, PROCTOR and FAHY, Circuit Judges.

BLEED THROUGH POOR COPY

PER CURIAM: Tom We Shung, appellant, is an alien born in China. He sought entry into the United States under authority of Act of Dec. 28, 1945, c. 591, § 1, 59 STAT. 659, 8 U. S. C. § 232 (1946 ed.),[1] upon the claim that he was a minor child of one Tom Wing, an honorably discharged veteran of World War II with United States citizenship. Admission was denied Shung upon the ground, as determined by a Board of Special Inquiry, that he had failed to satisfactorily establish his alleged relationship with Tom Wing. Suit was then filed in the District Court for a review under the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.* (1946 ed.), and for a declaratory judgment[2] that the hearing before the Board of Special Inquiry was unfair and void; and that Tom We Shung is the blood son of Tom Wing and so admissible to the United States.

In the course of hearings before the three-member Board of Special Inquiry its personnel was changed between hearings by substitution of one Immigration Inspector for another, and by substitution of a secretary, or clerk-stenograper, in place of another of the same rank. However, the members making final determination were familiar with all the evidence and no objection was

---

[1] "That notwithstanding any of the several clauses of section 3 of the Act of February 5, 1917, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of the effective date of this Act, be admitted to the United States . . . ."

[2] 28 U. S. C. § 2201 (Supp. V, 1952).

raised to the changes either at the hearings or at any stage of the administrative proceedings.

On this appeal appellant repeats contentions unsuccessfully urged in the District Court. They involve composition of the Board, legal incompetency of its members, changes in its personnel during the hearings, and sufficiency of the evidence to support the decision and order of exclusion, from which it is argued that the proceedings were unfair and a legal nullity. These questions are fully dealt with by District Judge Keech in an opinion reported in 103 F. Supp. 507 (1952). We agree with his conclusions (1) that the Board was properly constituted, if not, that failure to make timely objection to its composition rendered the point unavailable now,[3] (2) that the hearings by the Board were fair and its decision sufficiently supported by the evidence.

The recent decision of the Supreme Court in *Heikkila* v. *Barber,* 345 U. S. 229 (March 16, 1953), may suggest a serious question as to the right of judicial review of an exclusion order except by the limited process of habeas corpus. However, as appellant has been accorded the benefit of a full review and questions concerning validity of the administrative proceedings have been considered and resolved against him, it is unnecessary for us to consider the question now.

Affirmed.

---

[3] See United States v. Tucker Truck Lines, 344 U. S. 33 (November 10, 1952), decided after the decision of the District Court in the present case.

BLEED THROUGH POOR COPY

[fol. 16] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,417

TOM WE SHUNG, by His Next Friend, TOM WING, Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, and Watson B. Miller, Commissioner of Immigration, Appellees

Appeal from the United States District Court for the District of Columbia

Before Wilbur K. Miller, Proctor and Fahy, Circuit Judges

JUDGMENT—Filed July 2, 1953

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Curiam.

[File endorsement omitted.]

[fol. 17] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,417

[Title omitted]

DESIGNATION OF RECORD—Filed July 10, 1953

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the

BLEED THROUGH POOR COPY

United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix.
2. Opinion of the Court of Appeals.
3. Judgment of the Court of Appeals.
4. Designation of record.
5. Clerk's certificate.

Jack Wasserman, Counsel for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Designation of Record has been served upon Appellee by mailing a copy thereof to his attorney, Hon. Leo A. Rover, United States Attorney at Washington, D. C. this 9th day of July, 1953.

Jack Wasserman, Counsel for Petitioner.

[File endorsement omitted.]

[fol. 18] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 19] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, by His Next Friend Tom Wing, Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, et al.

ORDER ALLOWING CERTIORARI—Filed October 19, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 7 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING,
Petitioner,

vs.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JACK WASSERMAN,
Warner Building, Washington, D. C.,
Attorney for Petitioner.

ANDREW REINER, ESQ.,
Of Counsel.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	5

Citations

Cases:

Barnett v. *Mayes*, 643 F. 2d 521	5
Heikkila v. *Barber*, 345 U.S. 229	4, 5
Joy v. *Hague*, 175 F. 2d 395	4
Mansfield C & L.M.R. Co. v. *Swan*, 111 U.S. 379	4
McCrane v. *United States*, 100 F. 2d 322	5
United States v. *Corrick*, 298 U. S. 435	4
United States v. *Cusson*, 132 F. 2d 413	4, 5

Statutes:

Immigration Act of February 5, 1917 (39 Stat. 887; 8 U.S.C. 153)	2
Immigration Act of December 28, 1945 (59 Stat. 659; 8 U.S.C. 232)	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. —

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING,
Petitioner,

vs.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Tom We Shung, by his next friend Tom Wing, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the District of Columbia (R. 16), affirming a judgment of the District Court for the District of Columbia in favor of respondents.

Opinions Below

The Court of Appeals affirmed the judgment of the District Court in a per curiam opinion (R. 13). The opinion of the District Court is reported at 103 F. Supp. 507 (R. 7).

Jurisdiction

The judgment of the Court of Appeals was entered on July 2, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. In view of *Heikkila* v. *Barber*, 345 U. S. 229, did the courts below have jurisdiction to render a declaratory judgment in an exclusion proceeding where the order of exclusion was rendered and the action instituted prior to the effective date of the Immigration and Nationality Act of 1952 (66 Stat. 163)?

2. Where the Court of Appeals has serious doubt as to its jurisdiction, should it decide the merits of the controversy without deciding the issue of jurisdiction?

Statutes Involved

Section 17 of the Immigration Act of February 5, 1917 as amended, 39 Stat. 887 (8 U. S. C. 153) provides in part:

> "In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General."

The Immigration Act of December 28, 1945, 59 Stat. 659, 8 U. S. C. 232 provides as follows:

> "Notwithstanding any of the several clauses of Section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regula-

tions, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of December 28, 1945, be admitted to the United States: * * *"

Statement

Petitioner's complaint alleges that he is the blood son of Tom Wing, a World War II veteran and citizen of the United States and that he was admissible to the United States on November 28, 1947 when he arrived at San Francisco and sought entry as the alien son of a veteran pursuant to 8 U. S. C. 232. (R. 1) A three man board of special inquiry consisting of two immigrant inspectors and a clerk stenographer voted to exclude petitioner. One inspector and the clerk stenographer were not present during the first day of hearing when petitioner testified. On appeal to the Board of Immigration Appeals the order of exclusion was affirmed. Petitioner sought a judgment declaring that his hearing before the board of special inquiry was unfair because of failure to comply with the Administrative Procedure Act, because of the composition of the board of special inquiry, because those who heard his testimony were not the same individuals who rendered the decision and because the order of exclusion was not supported by substantial evidence.

The courts below have ruled that the board of special inquiry was properly composed, that timely objection was not made administratively on this issue, that the Administrative Procedure Act was inapplicable, and that the hearing was fair and a determination of exclusion justified. Petitioner seeks certiorari from a per curiam affirmance of the District Court's decision.

The case was argued in the Court of Appeals subsequent to this court's decision in *Heikkila* v. *Barber*, 345 U. S. 229. The Court of Appeals recognized that that decision "may suggest a serious question as to the right of judicial review of an exclusion order except by the limited process of habeas corpus." Nevertheless, without deciding the jurisdictional issue, the Court of Appeals affirmed on the merits.

Reasons for Granting the Writ

This writ of certiorari is sought because the issues presented herein raise important questions of federal practice and because the decision of the Court of Appeals thereon is in conflict with decisions of this court as well as with decisions of other circuits.

1. The decision below assuming jurisdiction to decide the merits of the controversy herein without deciding the jurisdictional issue is in conflict with this court's decision in *United States* v. *Corrick*, 298 U. S. 435, 440 and *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379. In the *Mansfield* case it was observed that:

> "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

The decision of the court below in neglecting to pass upon the jurisdictional issue and in deciding the merits, was contrary to the aforementioned decisions of this Court.

2. The court below should have dismissed the action solely on the basis of lack of jurisdiction rather than the merits if jurisdiction did not exist. In deciding the merits and passing over the jurisdictional issue, the court below acted contrary to decisions in other circuits. *Joy* v. *Hague*, 175 F. 2d 395 (C. C. A. 1, 1949); *United States* v. *Cusson*,

132 F. 2d 314 (C. C. A. 2, 1942); *McCrone* v. *United States*, 100 F. 2d 322 (C. C. A. 9, 1938), affirmed 307 U. S. 61; *Barnett* v. *Mayes*, 43 F. 2d 521 (C. C. A. 10, 1930).

The prevailing rule which was not followed by the court below is expressed in *United States* v. *Cusson, supra*, a decision by Circuit Judge Learned B. Hand as follows: The appellate court

> "is always under a duty to examine its jurisdiction *ex mero motu* and can never properly undertake to pass upon the merits till it has done so."

3. The decisions below are in conflict with *Heikkila* v. *Barber*, 345 U. S. 229 which holds that a declaratory judgment action may not be maintained in a case filed prior to to the Immigration and Nationality Act of 1952 (66 Stat. 163).

Conclusion

The decision below is in conflict with decisions of this Court and with the prevailing views of other circuits. Whether a federal court can pass upon the merits of a controversy without first inquiring into its own jurisdiction obviously involves an important question of federal procedure and practice. The decision below enunciates a novel principle which has not heretofore been approved by this Court nor by other circuits. It is for these reasons that petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

JACK WASSERMAN,
Warner Building, Washington 4, D. C.,
Attorney for Petitioner.

ANDREW REINER, ESQ.,
Of Counsel.

(9480)

BLEED THROUGH — POOR COPY

LE COPY

Office - Supreme Court, U.
FILED
NOV 18 1953
HAROLD B. WILLEY, Cl

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING,
Petitioner,

vs.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

JACK WASSERMAN,
Warner Building,
Washington 4, D. C.,
Attorney for Petitioner.

ANDREW REINER, ESQ.,
Of Counsel.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	3
Summary of Argument:	
Point I. The Circuit Court erred in deciding the merits herein without first concluding that it had jurisdiction of the action	4
Point II. *Heikkila* v. *Barber* should be reconsidered and overruled	7
(A) Historical Development	7
1. Nishimura Ekiu to Geigow	7
2. Lloyd Sabaudo to Heikkila	12
3. The Heikkila Case	14
(B) The Heikkila case should be reversed	15
1. Finality of immigration decisions does not preclude judicial review	16
2. Review is not precluded under Section 10 of the Administrative Procedure Act	18
3. The Legislative History of the 1952 Immigration Act reaffirms the conclusion that Declaratory Judgment is available	20
Point III. The hearing failed to comply with the immigration statute and was invalid	22
Point IV. The hearing was invalid for failure to comply with the Administrative Procedure Act	34
Point V. The hearing was unfair	38
Conclusion	41
Appendix A—Statutes and Regulations	42
Appendix "B"—Decision of Board of Immigration Appeals	47

CITATIONS

Cases:

	Page
Barnett v. *Mayes*, 43 F. 2d 521 (C.A. 10, 1930)	5
Bindczyck v. *Finucane*, 342 U.S. 76 (1951)	33
Bogiatzis v. *Hall*, 195 F. 2d 661, (C.A. 4, 1952)	38
Bridges v. *Wixon*, 326 U.S. 135 (1944)	11
Buschbaum & Co. v. *F.T.C.*, 153 F. 2d 85 (C.A. 7, 1946), 328 U.S. 819	40
Butler v. *Regents of the University*, 32 Wisc. 124 (1873)	26
C.A.B. v. *Modern Air Transport*, 179 F. 2d 622 (C.A. 2, 1950)	32
Chambers v. *Robertson*, 184 F. 2d 144 (C.A.D.C. 1950)	32
Chew v. *Colding*, 344 U.S. 590 (1953)	10
Chin Yow v. *United States*, 208 U. S. 8 (1908)	9, 10
Chin Wey v. *Wixon*, 4 F. 2d 247 (C.A. 1, 1925)	10
Democrat Printing Co. v. *Federal Communications Commission*, 202 F. 2d 298 (C.A.D.C.,1952)	32
Dong Ying Fun v. *Nagle*, 5 F. 2d 310 (C.A. 9, 1925)	25
Door v. *Donaldson*, 195 F. 2d 764 (C.A.D.C. 1952)	38
Estep v. *United States*, 327 U.S. 114 (1946)	11, 17, 19
Ex parte Lee Bock Fook, 40 F. Supp. 937, (S. D. Cal. 1941)	40
Ex parte Chin Shee, 1 F. 2d 798 (D. Mass. 1924)	10
Ex parte Keizo Kamiyama, 44 F. 2d 503 (C.A. 9, 1930)	39
Ex parte Sakaguchi, 277 F. 913 (C.A. 9, 1922)	11, 24
Ex parte Suzanna, 295 Fed. 713 (D. Mass. 1924)	11
Ex parte Tomimatsu, 232 Fed. 376 (N.D. Cal. 1916)	25
Ex parte Ver Pault, 86 F. 2d 113 (C.A. 2, 1936)	10
Federal Power Commission v. *Panhandle Co.*, 337 U.S. 498, (1949)	32
Fok Young Yo v. *United States*, 185 U.S. 296 (1902),	8, 15, 16
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893)	8, 15
Fowler et al. v. *Crown-Zellerbach*, 163 F. 2d 773 (C.A. 9, 1947)	33
Geigow v. *Uhl*, 239 U.S. 3 (1915)	10, 16, 17, 19

Page

General Broadcasting System v. *Bridgeport B. Station*, 53 F. 2d 664 (D. Conn. 1931) 29

Gin Soon Ging v. *Carmichael*, 123 F. 2d 72 (C.A. 9, 1941) 39

Gonzales v. *Williams*, 192 U.S. 1 (1904) 9, 32, 33

Gusik v. *Schilder*, 340 U.S. 128 (1950) 34

Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 14

Heikkila v. *Barber*, 345 U.S. 229 (1953) 3, 4, 6, 14

Heiliger v. *City of Sheldon*, 236 Iowa 146 (1945) 26

Heitmeyer v. *Federal Communications Commission*, 95 F. 2d 91 (C.A.D.C. 1937) 29

Hoey Lum Qung v. *Johnson*, 299 Fed. 246 (C.A. 1, 1924) 10

Hom Moon Ong v. *Nagle*, 32 F. 2d 470 (C.A. 9, 1929) 40

Hormel v. *Helvering*, 312 U.S. 552 (1941) 22

Johnson v. *Shaughnessy*, 336 U.S. 806 (1949) 11, 16

Johnson v. *Tertzag*, 2 F. 2d 40 (C.A. 1, 1924) 10

Joy v. *Hague*, 175 F. 2d 395 (C.A. 1, 1949) 5

Kessler v. *Strecker*, 307 U.S. 22 (1939) 11

King v. *Edward Hines' Lumber Co.*, 68 F. Supp. 1019 D. Oregon, 1946) 33

Kristensen v. *McGrath*, 179 F. 2d 796 (C.A.D.C. 1949) 11, 19

Kwock Jan Fat v. *White*, 253 U.S. 454 (1920) 38

Lee Lung v. *Paterson*, 186 U.S. 168 (1902) 9, 16

Lem Moon Sing v. *United States*, 158 U.S. 538 (1895) 8

Lloyd Sabaudo Societa Anonima v. *Elting*, 287 U.S. 329 (1932) 11, 12, 16

Lovell v. *City of Griffin*, 303 U.S. 444 (1938) 32

Manhattan Co. v. *Commissioner*, 297 U.S. 129 (1936) 28

Mansfield C. & L. M. R. Co. v. *Swan*, 111 U.S. 379 (1884) 5

Martinez v. *Neelly*, 197 F. 2d 462 (C.A. 7, 1952; No. 218, October Term, 1952) 14

Page

Masses Publishing Co. v. *Patten*, 244 Fed. 535 (S.D. N.Y. 1917) 11
McCrone v. *United States*, 100 F. 2d 322 (C.A. 9, 1938), affirmed 307 U.S. 61 (1939) 5
McGrath v. *Kristensen*, 340 U.S. 162 (1950) 11, 13, 16, 31
Mitchell v. *Metcalf*, 269 U.S. 514 (1926) 26
Montana Nat. Bank of Billings v. *Yellowstone Co.*, 276 U.S. 499 (1928) 32
National Discount Corp. et al. v. *O'Mell*, 194 F. 2d 452 (C.A. 6, 1952) 11
Ning v. *Brownell* (C.A. D.C. No. 11,496) 6
Nishimura Ekiu v. *United States*, 142 U.S. 651 (1892) 7
Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 11
Pennsylvania R. Co. v. *International Coal Co.*, 230 U.S. 184, 197 (1913) 32
Perkins v. *Elg*, 307 U.S. 325 (1939) 16, 17
Prince v. *Commissioner*, 185 F. 2d 578 (C.A. 6, 1950) 20
Procter & Gamble Distributing Co. v. *Sherman*, 2 F. 2d 165, 167 (S.D.N.Y. 1924) 32
Public Utilities Comm. v. *United Fuel Gas Co.*, 317 U.S. 456 (1943) 32
Quon Quon Poy v. *Johnson*, 273 U.S. 352 (1926) 10
Rubinstein v. *Brownell*, 206 F. 2d 449 (C.A.D.C. 1953) 21
Skinner and Eddy Corp. v. *United States*, 249 U.S. 557 (1919) 28, 32
Smith v. *Cahoon*, 283 U.S. 553 (1931) 32
Stratton v. *St. Louis Southwestern R. Co.*, 282 U.S. 10 (1930) 29
Sherrer v. *Sherrer*, 344 U.S. 343 (1948) 33
S.S.W., Inc. v. *Air Transport Assn.*, 191 F. 2d 658 (C.A.D.C. 1951) 34
Sung v. *McGrath*, 339 U.S. 33 (1950) 36
The Japanese Immigrant Case, 189 U.S. 86 (1903) 9
Tucker v. *Alexander*, 275 U.S. 228 (1927) 33
United States v. *Corrick*, 298 U.S. 435 (1936) 5
United States v. *Cusson*, 132 F. 2d 413 (C.A. 2, 1942) 5
United States v. *Ju Toy*, 198 U.S. 253 (1905) 10

Page

United States v. *Maurice*, 2 Brock 96, 26 Fed. Cases No. 15,747 (C.C. Va., 1823) 25

United States v. *Powell*, 38 F. Supp. 183 (D.C.N.J. 1941) 11

United States v. *Sing Tuck*, 194 U.S. 161 (1904) 32

United States v. *Sotis*, 131 F. 2d 783 (C.A. 7, 1942) 33

U.S. ex rel Boxer v. *Tod*, 294 Fed. 628 (C.A. 2, 1923) 10

U.S. ex rel. Bradley v. *Watkins*, 163 F. 2d 328 (C.A. 2, 1949) 32

U.S. ex rel. Brandt v. *District Director*, 40 F. Supp. 371 (S.D.N.Y. 1941) 38

U.S. ex rel. Brugnoli v. *Tod*, 300 Fed. 913 (S.D.N.Y. 1923) 11

U.S. ex rel. De Lucia v. *O'Donovan*, 178 F. 2d 876 (C.A. 7, 1950) 32

U.S. ex rel. Duner v. *Curran*, 10 F. 2d 38 (C.A. 2, 1925) 10

U.S. ex rel. Errichetti, 39 F. Supp. 388 (E.D.N.Y. 1941) 11

U.S. ex rel. Fink v. *Tod*, 1 F. 2d 246 (C.A. 2, 1924) 10

U.S. ex rel. Fong Lung Sing v. *Day*, 37 F. 2d 36 (C.A. 2, 1930) 10

U.S. ex rel. Friedman v. *Tod*, 296 Fed. 888 (C.A. 2, 1924) 10

U.S. ex rel. Frisch v. *Miller*, 181 F. 2d 360 (C.A. 5, 1950) 36

U.S. ex rel. Georgian v. *Uhl*, 271 Fed. 676 (C.A. 2, 1921) 11

U.S. ex rel. Hadrosek v. *Shaughnessy*, 101 F. Supp. 432 (S.D.N.Y. 1951) 11

U.S. ex rel. Hom Yuen Jum v. *Denton*, 291 Fed. 905 (S.D.N.Y. 1923) 10

U.S. ex rel. Mantler v. *Commissioner*, 3 F. 2d 234 (C.A. 2, 1924) 11

U.S. ex rel. Minuto v. *Reimer*, 83 F. 2d 166 (C.A. 2, 1936) 25, 40

Page

U.S. ex rel. Ohm v. *Perkins*, 79 F. 2d 533 (C.A. 2, 1935) 40
U.S. ex rel. Pasciuto v. *Baird*, 39 F. Supp. 411 (E.D. N.Y. 1941) 11
U.S. ex rel. Pazos v. *Redfern*, 180 Fed. 500 (C.C.E.D. La. 1910) 30
U.S. ex rel. Saclarides v. *Shaughnessy*, 180 F. 2d 687 (C.A. 2, 1950) 36
U.S. ex rel. Singleton v. *Tod*, 290 Fed. 78 (C.A. 2, 1923) 11
U.S. ex rel. Soo Hoo Hong v. *Tod*, 290 Fed. 689 (C.A. 2, 1923) 10
U.S. ex rel. Trinler v. *Carusi*, 166 F. 2d 457 (C.A. 3, 1948) 19
U.S. ex rel. Volpe v. *Jordan*, 161 F. 2d 390 (C.A. 7, 1947) 33
Varney et al. v. *Warehime, et al.*, 147 F. 2d 238 (C.A. 6, 1945) 32
Whitty v. *Weedin*, 68 F. 2d 127 (C.A. 9, 1933) 11
Williams v. *North Carolina*, 325 U.S. 226 (1945) 33
Woon Sun Seung v. *Proctor*, 99 F. 2d 285 (C.A. 9, 1938) 39
Zacharias v. *McGrath*, 105 F. Supp. 421 (D.C. Dist. of Col., 1952; C.A.D.C. No. 11,578) 6
Zank v. *Landon*, 205 F. 2d 615 (C.A. 9, 1953) 4, 5

Statutes and Regulations:

Administrative Procedure Act, June 11, 1946 44
5 U.S.C. 1004 ..... 37, 44
5 U.S.C. 1006 ..... 36, 45
5 U.S.C. 1009 ..... 18, 46
5 U.S.C. 1010 ..... 34, 46
Declaratory Judgment Act, 28 U.S.C. 2201 ..... 18, 42
Immigration Act, February 15, 1917 42
8 U.S.C. 152, 39 Stat. 885 42
8 U.S.C. 153, 39 Stat. 887 ..... 7, 23, 43
8 U.S.C. 164, 39 Stat. 893 43
Immigration Act of December 28, 1945 ..... 22, 42
8 U.S.C. 232, 59 Stat. 659 42
National Labor Relations Act, 29 U.S.C. 160 (c) 32

Page

Rule 12, Rules of Civil Practice 33
Securities Act, 15 U.S.C. 77 (i) (a) 32
8 *Code of Federal Regulations* 43
60.27 ..... 35, 43
60.29 ..... 35, 44

Miscellaneous:

Attorney General's Manual on Administrative Procedure Act, pp. 71-72 ..... 35, 36
Barron & Holtzoff, Federal Practice and Procedure, Volume 1, p. 964 33
Clark, Boards of Special Inquiry, Monthly Review, Immigration and Naturalization Service, March, 1952, p. 116 27
Conference Report 2096, 82nd Cong. 2d Sess. p. 127 21
Congressional Record, Vol. 98, p. 4483 21
Davis, Administrative Law, 343-345 40
House Report 1365, 82nd Cong. 2d Sess. p. 28 21
House Report 2140, 80th Cong. 2d Sess. p. 4 37
Joint Hearings before the Sub-Committees of the Committees of the Judiciary on S. 716 H.R. 2379, H. R. 2816, pp. 536-537 20
Monthly Review, Immigration and Naturalization Service, February, 1947, p. 101 38
Nims, Pre-Trial 164 33
Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service (1940) pp. 45, 51 ..... 12, 27
Senate Document 248, 79th Cong. 2d Sess. 212-213; 275-276 19
Senate Document 747, 61st Cong., 3rd Sess., Vol. I, p. 32 (1911) 30
Senate Report 352, 61st Cong. 1st Sess. p. 5 11
42 *American Jurisprudence*, 515, 517, 882, 889, 890 ..... 26, 33
56 *Yale Law Journal*, 701 35
66 *Harvard Law Review*, 1389 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING,
Petitioner,

vs.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The Court of Appeals affirmed the judgment of the District Court in a per curiam opinion (R. 13). The opinion of the District Court is reported at 103 F. Supp. 507 (R. 7).

Jurisdiction

The judgment of the Court of Appeals was entered on July 2, 1953. The jurisdiction of this Court is invoked

under 28 U. S. C. 1254(1). Certiorari was granted on October 19, 1953.

Questions Presented

1. In view of *Heikkila* v. *Barber*, 345 U. S. 229 (1953), did the courts below have jurisdiction to render a declaratory judgment in an exclusion proceeding where the order of exclusion was rendered and the action instituted prior to the effective date of the Immigration and Nationality Act of 1952 (66 Stat. 163)?

2. Where the Court of Appeals has serious doubt as to its jurisdiction, should it decide the merits of the controversy without deciding the issue of jurisdiction?

3. Should *Heikkila* v. *Barber*, *supra*, be reconsidered and reversed?

4. Where the Immigration Statute (8 U. S. C. 153) provides that a Board of Special Inquiry shall consist of three members selected from immigration officials, is an exclusion order entered by a three man board in which a clerk-stenographer participates as a board member valid?

5. Must such issue of the Board's composition be raised administratively and does the government waive its objection to failure to raise such issue administratively by its neglect to raise the issue prior to trial?

6. Is such a Board exempt from the separation of functions and independent hearing officer's provisions of the Administrative Procedure Act (5 U. S. C. 1004-c, 1010) upon the ground that it is a special statutory board exempt under 5 U.S.C. 1006-a?

7. May the personnel of such Board be changed during the course of the administrative hearings and was the Board's determination that petitioner was not the son of a veteran of World War II and therefore inadmissible to the United States under 8 U.S.C. 232 reached after a fair hearing?

Statement

Petitioner's complaint alleges that he is the blood son of Tom Wing, a World War II veteran and citizen of the United States and that he was admissible to the United States on November 28, 1947 when he arrived at San Francisco and sought entry as the alien son of a veteran pursuant to 8 U. S. C. 232. (R. 1) A three man board of special inquiry consisting of two immigrant inspectors and a clerk stenographer voted on February 24, 1949 to exclude petitioner. One inspector and the clerk stenographer were not present during the first day of hearing when petitioner testified. On appeal to the Board of Immigration Appeals the order of exclusion was affirmed. Petitioner sought a judgment declaring that his hearing before the board of special inquiry was unfair because of failure to comply with the Administrative Procedure Act, because of the composition of the board of special inquiry, because those who heard his testimony were not the same individuals who rendered the decision and because the order of exclusion was not supported by substantial evidence.

The courts below have ruled that the board of special inquiry was properly composed, that timely objection was not made administratively on this issue, that the Administrative Procedure Act was inapplicable, and that the hearing was fair and a determination of exclusion justified. Petitioner seeks reversal of a per curiam affirmance of the District Court's decision.

The case was argued in the Court of Appeals subsequent to this court's decision in *Heikkila* v. *Barber*, 345 U. S. 229 (1953). The Court of Appeals recognized that that decision "may suggest a serious question as to the right of judicial review of an exclusion order except by the limited process of habeas corpus." Nevertheless, without deciding the jurisdictional issue, the Court of Appeals affirmed on the merits.

Statutes and Regulations

The applicable statutes and regulations are set forth in Appendix "A" herein.

Summary of Argument

Petitioner contends that if *Heikkila* v. *Barber*, 345 U. S. 229 (1953) is to be followed, the Circuit Court should have remanded the cause for dismissal on jurisdictional grounds without deciding the merits herein. *Zank* v. *Landon*, 205 F. 2d 615 (C. A. 9, 1953). If *Heikkila* v. *Barber*, is not followed, then the courts below erred in sustaining the exclusion order herein because (1) petitioner was not accorded a hearing before three immigration officials as prescribed by the 1917 Immigration Act, (2) the hearing violated the Administrative Procedure Act which was applicable to the hearings conducted herein in 1948 and 1949, and (3) the hearing was unfair due to changes in the personnel of the board of special inquiry.

Point I

The Circuit Court Erred in Deciding the Merits Herein Without First Concluding That It Had Jurisdiction of of the Action.

1. The Court below, in assuming jurisdiction to decide the merits of the controversy herein, without deciding the jurisdictional issue, violated Rule 12(h) of the Rules of Civil Practice which provides:

> "* * * whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

See *Zank* v. *Landon*, 205 F. 2d 615 (C. A. 9, 1953), *infra*.

2. The decision below is in conflict with this court's decision in *United States* v. *Corrick*, 298 U. S. 435, 440 (1936) and *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 (1884). In the *Mansfield* case it was observed that:

> "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

The decision of the court below in neglecting to pass upon the jurisdictional issue and in deciding the merits, was contrary to the aforementioned decisions of this Court.

3. The court below should have dismissed the action solely on the basis of lack of jurisdiction rather than the merits if jurisdiction did not exist. In deciding the merits and passing over the jurisdictional issue, the court below acted contrary to decisions in other circuits. *Joy* v. *Hague*, 175 F. 2d 395 (C. A. 1, 1949); *United States* v. *Cusson*, 132 F. 2d 413 (C. A. 2, 1942); *McCrone* v. *United States*, 100 F. 2d 322 (C. A. 9, 1938), affirmed 307 U. S. 61; *Barnett* v. *Mayes*, 43 F. 2d 521 (C. A. 10, 1930).

The prevailing rule which was not followed by the court below is expressed in *United States* v. *Cusson, supra*, a decision by Circuit Judge Learned Hand as follows: The appellate court

> "is always under a duty to examine its jurisdiction *ex mero motu* and can never properly undertake to pass upon the merits till it has done so."

4. In *Zank* v. *Landon*, 205 F. 2d 615 (C. A. 9, 1953) a declaratory judgment to review a deportation order was dismissed upon the merits in the District Court in December, 1952. After the decision of the Supreme Court in

Heikkila v. *Barber*, 345 U. S. 229 (March 16, 1953), upon motion of the *appellant*, the case was remanded to the District Court with directions to dismiss for lack of jurisdiction in accordance with Rule 12(h) of the Rules of Civil Practice.

Zacharias v. *McGrath*, 105 F. Supp. 421 (D. C. Dist. of Col., 1952) involved an alien excluded from readmission to the United States. His declaratory judgment action was terminated in the lower court, upon the grant of defendant's motion for judgment on the pleadings. No jurisdictional objection appears to have been raised in that court. Upon appeal to the Court of Appeals for the District of Columbia, the court remanded the cause for dismissal solely for lack of jurisdiction upon the authority of the *Heikkila* case. This action was taken in the Court of Appeals below subsequent to the decision herein. (See: *Zacharias* v. *McGranery*, C. A. D. C., No. 11,578). In the instant case, as in *Ning* v. *Brownell*, (C. A. D. C., No. 11,496), now pending undecided in the Court of Appeals, the position of the government has been that the cause should be dismissed for lack of jurisdiction, without deciding the merits, upon the authority of the *Heikkila* case.

5. It should be noted that *Heikkila* v. *Barber*, *supra*, a deportation case, arose upon a motion to dismiss for failure to join proper parties and failure to state a cause of action. In opposing the grant of an appeal to this Court, the Solicitor General noted at page 6 of his opposition (No. 426, October, 1952 Term) that "The question of the reviewability of deportation orders by actions other than habeas corpus is not involved in this case". Nevertheless, this Court held that habeas corpus was the exclusive remedy, indicating that this type of jurisdictional defect may be considered by the Court of its own motion and that it can not be waived. There can be no question that if declaratory

judgment actions may not be maintained prior to December 24, 1952 in deportation cases, that they may not be recognized in exclusion cases where, as here, they were filed prior to the 1952 Immigration and Nationality Act (66 Stat. 163). The Attorney General's decision in an exclusion case (8 U. S. C. 153, Appendix "A", herein) is just as final under the 1917 Immigration Act as his deportation order.

Point II

Heikkila v. Barber Should Be Reconsidered and Overruled.

It would make the task of counsel much simpler, to seek reversal of the decision below upon jurisdictional grounds. Were they to so confine themselves, they would compromise their intellectual honesty and forsake their trust as officers of this Court. We believe that the *Heikkila* case inadequately presented to this Court both in briefs and in oral argument the jurisdictional issue presented herein. We respectfully submit, that the opinions in the *Heikkila* case completely overlook the evolution of judicial review of immigration cases in this Court over the span of the last fifty years. It is due to the conflict between *Heikkila* and landmark cases in the history of this Court, that counsel seek reconsideration of the jurisdictional issue herein.

(A) Historical Development

1. *Nishimura Ekiu to Giegow*

The early immigration cases, some of which involved constitutional attacks upon the substantive provisions of our immigration laws, would deny access to the courts to aliens ordered deported and excluded.

Nishimura Ekiu v. *United States*, 142 U. S. 651 (1892) declared that an alien excluded as a public charge could not seek judicial intervention and:

> "be permitted to enter in opposition to the *constitutional and lawful* measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive and administrative officers *acting within powers expressly conferred by Congress*, are due process of law". (Italics supplied.)

Fong Yue Ting v. *United States*, 149 U. S. 698 (1893) upheld the constitutionality of a deportation statute which required the removal of domiciled Chinese laborers unable to produce certificates of residence or establish lawful residence by at least one credible white witness. Justices Brewer, Field and Fuller recorded notable dissents to a decision which deprived aliens of procedural due process. The majority invoked the absolute power of Congress to exclude or deport, saying:

> "The question whether and upon what conditions these aliens shall be permitted to remain in the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

Lem Moon Sing v. *United States*, 158 U. S. 538 (1895) through Mr. Justice Harlan reaffirms the right of Congress to exclude any and all aliens "without judicial intervention." Mr. Chief Justice Fuller repeats this conclusion in an exclusion case, *Fok Young Yo* v. *United States*, 185 U. S. 296 (1902). However, he first acknowledges that judicial intervention may be required by treaty, statute, or the Constitution before stating that:

> "Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for

many years the recognized and declared policy of the country."

Lee Lung v. *Paterson,* 186 U. S. 168 (1902) reaffirms the finality of an executive decision, even though it might be contrary to law. The court said:

> "* * * we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper."

However, in *Gonzales* v. *Williams,* 192 U. S. 1 (1904) an attempt to exclude a Puerto Rican was considered reviewable since he was not an alien.

Prior to the Immigration Act of 1907, (34 Stat. Pt. 1, 899) deportation was restricted to those who entered the United States unlawfully. It was a form of delayed exclusion. One is not surprised, therefore, to find similar expressions in deportation cases. *The Japanese Immigrant Case,* 189 U. S. 86 (1903) relying upon exclusion and deportation cases, declares that Congress may commit deportation decisions to the executive without judicial intervention but it cautions that the Supreme Court "has never held nor must we now be understood as holding, that administrative officers when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

Citizenship claimants soon tore down the barrier of finality of executive action and the refusal of judicial intervention. Mr. Justice Holmes refused to give absolute finality to executive action of exclusion in *Chin Yow* v. *United States,* 208 U. S. 8 (1908) unless a fair administrative hear-

ing had been granted.[1] In *Geigow* v. *Uhl*, 239 U. S. 3 (1915) the barrier was completely removed. Geigow, like Miss Eiku, was excluded upon the ground that he was likely to become a public charge. Solicitor General Davis argued that an adverse administrative decision was final and unreviewable. Mr. Justice Holmes answered:

> "The Courts are not forbidden by the statute to consider whether the reasons, when they are given agree with the requirements of the Act. The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus. The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact. This was implied in *Nishimura Ekiu* v. *United States*, 142 U. S. 651 * * * relied on by the government."

Geigow v. *Uhl*, *supra*, became a landmark decision, not only in exclusion[2] and deportation[3] cases but also in other

---

[1] In the earlier case of *United States* v. *Ju Toy*, 198 U.S. 253 (1905) Justice Holmes upheld exclusion of an American citizen by executive decision without a judicial trial upon the theory that such "decision is due process of law." See comment by *Prof. Hart*, 66 *Hazvard Law Review* 1389. In accord with *Chin Yow* v. *United States* are *Tang Tun* v. *Edsell*, 223 U.S. 673 (1911) and *Quon Quon Poy* v. *Johnson*, 273 U.S. 352 (1926). Compare, *Chew* v. *Colding*, 344 U.S. 590 (1953).

[2] *Ex parte Ver Pault*, 86 F. 2d 1113, 116 (C.A. 2, 1936); *U.S. ex rel. Fong Lung Sing* v. *Day*, 37 F. 2d 36, 37 (C.A. 2, 1930); *Johnson* v. *Keating*, 17 F. 2d 50, 51 (C.A. 1, 1926; *U.S. ex rel. Duner* v. *Curran*, 10 F. 2d 38, 41 (C.A. 2, 1925); *Chin Wey* v. *Wixon*, 4 F. 2d 247, 248 (C.A. 1, 1925); *Johnson* v. *Tertzag*, 2 F. 2d 40, 41, (C.A. 1, 1924); *Ex parte Chin Shee*, 1 F. 2d 798 (D.C. Mass. 1924); *U.S. ex rel. Fink* v. *Tod*, 1 F. 2d 246, 258 (C.A. 2, 1924); *Hoey Lum Qung* v. *Johnson*, 299 Fed. 246, 248 (C.A. 1, 1924); *U.S. ex rel. Friedman* v. *Tod*, 296 Fed. 888, 890 (C.A. 2, 1924); *U.S. ex rel Boxer* v. *Tod*, 294 Fed. 628, 633 (C.A. 2, 1923); *U.S. ex rel. Hom Yuen Jum* v. *Denton*, 291 Fed. 905, 906 (S.D.N.Y. 1923); *U.S. ex rel. Soo Hoo Hong* v. *Tod*, 290 Fed. 689, 695 (C.A. 2,

phases of administrative law. It was followed with complete approval by this Court in *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922—Justice Brandeis); *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 335 (1932—Justice Stone); *Kessler* v. *Strecker*, 307 U. S. 22, (1939—Justice Roberts); and *Estep* v. *United States*, 327 U. S. 114 (1946—Justice Douglas). Without citing the *Geigow* case, this Court followed its reasoning in *Bridges* v. *Wixon*, 326 U. S. 135 (1944); *Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949); and *McGrath* v. *Kristensen*, 340 U. S. 162 (1950). The decision found approbation in selective service cases [*Estep* v. *United States, supra; United States* v. *Powell*, 38 F. Supp. 183, 189 (D.C.N.J., 1941); *U. S. ex rel. Errichetti*, 39 F. Supp. 388, 380 (E.D.N.Y., 1941); *U. S. ex rel. Pasciuto* v. *Baird*, 39 F. Supp. 411, 414 (E.D.N.Y., 1941)] in post office cases [*Masses Publishing Co.* v. *Patten*, 244 Fed. 535, 537 (S.D. N.Y., 1917)] and in cases of body execution for civil debt [*National Discount Corp. et al.* v. *O'Mell*, 194 F. 2d 452, 456 (C.A. 6, 1952)].

Moreover, note should be made of the fact that when Congress enacted the 1917 Immigration Act (39 Stat. 874), it was not only aware of *Geigow* v. *Uhl*, decided two years before, but it also specifically referred to the case in treating with the subject of public charges (*Senate Report 352*, 61st Cong., 1st Sess., p. 5).

1923); *Ex parte Sakagushi*, 277 Fed. 913, 916 (C.A. 9, 1922); *U.S. ex rel. Hadrosek* v. *Shaughnessy*, 101 F. Supp. 432, 435 (S.D.N.Y. 1951).

[3] *Kristensen* v. *McGrath*, 179 F. 2d 796, 799 (C.A.D.C. 1949); *Whitty* v. *Weedin*, 68 F. 2d 127, 130 (C.A. 9, 1933); *U.S. ex rel. Mantler* v. *Commissioner*, 3 F. 2d 234, 236 (C.A. 2, 1924); *U.S. ex rel Brugnoli* v. *Tod*, 300 Fed. 913, 915 (S.D.N.Y. 1923); *Ex parte Suzanna*, 295 Fed. 713, 714 (D. Mass. 1924); *U.S. ex rel. Singleton* v. *Tod*, 290 Fed. 78, 81 (C.A. 2, 1923); *U.S. ex rel. Georgian* v. *Uhl*, 271 Fed. 676, 677 C.A. 2, 1921).

2. *Lloyd Sabaudo to Heikkila*

Lloyd Sabaudo Societa Anonima v. *Elting, supra,* involved an action seeking to recover immigration fines imposed upon landing an excludable alien. In speaking for the Court, Justice Stone summarized the law as it has existed for the last quarter of a century. He said:

> "The action of the Secretary is, nevertheless subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority, compare *Gonzales v. Williams,* 192 U. S. 1, *Geigow v. Uhl,* 239 U. S. 3, whether there was any evidence before him to support his determination, compare *Vajtauer v. Commission of Immigration,* 273 U. S. 103, and whether the procedure he adopted in making it satisfied elementary standards of fairness reasonableness, essential to the due administration of the summary proceeding which Congress has authorized. Compare *Kwock Jan Fat v. White,* 253 U. S. 454, *Tang Tun v. Edsell,* 223 U. S. 673; *Chin Yow v. United States,* 208 U. S. 8, 12; *The Japanese Immigrant Case,* 189 U.S. 86, 100, 101. * * * "

On May 17, 1940, Professors Marshall E. Dimock of the University of Chicago, Henry M. Hart of Harvard and John McIntire of George Washington University completed a comprehensive two year study of immigration practices for the Secretary of Labor who was then in charge of the Immigration and Naturalization Service. Their report, entitled the *Secretary of Labor's Committee on Administrative Procedure—The Immigration and Naturalization Service,* describes the evolution of judicial review from 1892 through *Geigow* v. *Uhl* and particularly the declaration of Justice Stone as follows:

> "This statement represents nothing less than a transformation in judicial doctrine when compared with the doctrines enunciated in the *Nishimura Ekiu, Fong Yue*

> *Ting* and immediately succeeding cases. Beginning with a conception of the immigration agencies as independent tribunals possessing substantially final authority with respect to all matters of construction and application of the immigration laws, the Court has swung around to a conception of them as, in effect, subordinate tribunals—entrusted, to be sure, with a wide range of discretion but subject to pervasive control by the courts. The powers attributed to executive officers in the early decisions were justified as resulting from the peculiarly absolute power of Congress over the admission and expulsion of aliens. Yet the powers attributed to them in Mr. Justice Stone's statement in the *Elting* case are not materially greater than the powers admittedly possessed by many administrative agencies over essential interests of citizens. And the restraints to which they are declared to be subject are not materially less." (p. 45)

As noted above, the *Geigow* and *Elting* cases remained impregnable and were followed without question in *Kessler* v. *Strecker, Estep* v. *United States, Bridges* v. *Wixon, Johnson* v. *Shaughnessy,* and *McGrath* v. *Kristensen.*

It was in *McGrath* v. *Kristensen,* 340 U. S. 162 (1950), that the Department of Justice revived the thirty-five year old rejected contention of Solicitor General Davis made in 1915 in the *Geigow* case. In attempting to defeat an action for declaratory judgment in a deportation case, it contended that the finality of the Attorney General's decisions in immigration cases, precluded review except in habeas corpus (Government's Brief, No. 34, October, 1950, Term, pp. 24 *et seq.*). The argument was rejected by seven members of this Court who said through Mr. Justice Reed at pages 168-169:

> "• • • the Government does contend that the Immigration Act provision, §19(a), making the Attorney General's decision on deportation 'final' precludes judicial review except by habeas corpus of his refusal

> to grant suspension of deportation. * * * Since the administrative determination is final, the alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. This is an actual controversy between the alien and immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of federal courts, 28 U.S.C. §1331 and the terms of the Declaratory Judgment Act, 28 U.S.C. §2201."

The deportation cases of *Mascitti* and *Coleman* (Nos. 206, 264, October Term, 1951) came to this Court in actions for declaratory judgments and were decided on the merits in *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952) over objections of the Government that decisions of this character were unreviewable (Brief, pp. 57 *et seq.*). *Martinez* v. *Neelly*, 197 F. 2d 462 (C.A. 7, 1952), was a declaratory judgment which was decided adversely to the alien on the merits in the courts below. In this Court, the Government again asserted in briefs and oral argument that habeas corpus was the exclusive method of review (Brief, pp. 18 *et seq.*, No. 218, October Term, 1952). In a four to four decision, this Court affirmed without opinion, thus upholding the decision in the Government's favor on the merits. 344 U. S. 916 (1953).

3. *The Heikkilla Case*

In *Heikkila* v. *Barber*, 345 U. S. 229 (1953), the declaratory judgment action to review a deportation order was dismissed upon the merits in the district court. In this Court, as noted above, the Government at first declared that no question was raised as to the exclusiveness of habeas corpus. The issue was not covered in the alien's main brief. The Government's main brief merely incorporated its *Martinez* case argument by reference. A reply brief, hastily drafted, inadequately attempted to rebut the argu-

ment that declaratory judgment was not maintainable. Oral argument in this Court was as cursory on this issue as the treatment of the subject in the briefs of both sides.

It is therefore not too surprising, that the *Heikkila* case completely overlooked some fifty years development of judicial review in immigration cases. Reverting to *Fong Yue Ting* and *Fok Young Yo*, the Court declared at 345 U. S. 234-235:

> "During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution. * * * And by 1901, Mr. Chief Justice Fuller was able to describe as 'for many years the recognized and declared policy of the country' the congressional decision to place 'the final determination of the right of admission in executive officers, without judicial intervention.' * * * Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 889, clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution. And the decisions have continued to regard this point as settled."

(B) The Heikkila Case Should Be Reversed

The incorrect premise of the Heikkila case is that judicial intervention in immigration cases is permissible only in habeas corpus because that remedy evolved solely to test rights protected by the constitution. Rights not under constitutional safeguards, would not be entitled to judicial assistance. If this be the law, then our immigration officials may violate the law and abuse their discretion without judicial intervention—provided they remain within the bounds of the constitution. This is not true in other phases of administrative law. Why should such a novel doctrine prevail here?

The *Heikkila* case reverts back to 1902 when the Supreme Court in *Fok Young Yo* v. *United States,* 185 U. S. 296, and *Lee Lung* v. *Paterson,* 186 U. S. 168, refused to review errors of law for excluded aliens. *Geigow* v. *Uhl,* 239 U. S. 3 (1915), and the thirty-five years of development which followed have been completely overlooked. No constitutional rights were involved in the *Geigow* case, and yet this Court intervened to correct an error of law. When this Court demanded fair procedures in compliance with applicable regulations for Miss Johnson, an excluded alien, no constitutional mandate was involved (*Johnson* v. *Shaughnessy,* 336 U. S. 806). Judicial intervention was not required by the constitution in *McGrath* v. *Kristensen,* 340 U. S. 162 (1950) nor was the constitution invoked to reject the Government's argument that habeas corpus was the exclusive remedy. In assuming jurisdiction of declaratory judgment actions in the *Martinez* and *Harisiades* cases, this Court conformed to the developments in administrative law and immigration cases from *Geigow* to *Kristensen.*

1. *Finality of immigration decisions does not preclude judicial review*

Ever since the *Geigow* and *Elting* cases, the finality of immigration decisions has not precluded judicial review to determine whether the administrative action contravened the constitution, the statute, or whether it was reached without a fair hearing or supporting evidence. *Lloyd Sabaudo Societa Anonima* v. *Elting,* 287 U. S. 329 (1932).

Judicial review of cases governed by a statutory declaration of finality is not limited to habeas corpus. Depending upon the nature of the case, and the available judicial techniques, review may otherwise be had, *e.g., Lloyd Sabaudo Societa Anonima* v. *Elting, supra* (review in an immigration case by suit to recover fines); *Perkins* v. *Elg,* 307 U. S. 325 (1939) and *McGrath* v. *Kristensen,* 340 U. S. 162 (1944)

(review in deportation cases by declaratory judgment actions); *Estep* v. *United States*, 327 U. S. 114 (1946) (review in selective service case by defense of improper classification in criminal trial).

Mr. Justice Holmes in the *Geigow* case, involving an excluded alien, declared that finality under our immigration statutes meant "conclusiveness upon matters of fact" only. Thus, it is clear that the finality involved in immigration decisions under the 1917 Immigration Act is effectuated when judicial review is restricted to the *type of issues* historically deemed proper for the court—*matters of law*, to use a shorthand expression. Such *finality* is not concerned with the method of obtaining review, since obviously review in declaratory judgment actions can be as strictly limited in scope as review in habeas corpus—to naked questions of law. The Government's finality argument restricting review to habeas corpus was rejected in the *Kristensen* case, and it was decided that a cause ripe for declaratory judgment had been established. *McGrath* v. *Kristensen, Perkins* v. *Elg, Geigow* v. *Uhl*, can not remain as controlling law at the same time with *Heikkila* v. *Barber*. If finality of immigration decisions preclude judicial review, it matters not whether review be in habeas corpus or declaratory judgment and it matters not whether the issue be one of eligibility to citizenship or excludability.

Thus, is thrown in bold relief the error of the *Heikkila* case. From any legitimate viewpoint of administrative finality, it matters not one whit whether a narrow issue of law be reviewed by habeas corpus or by the more civilized method of a declaratory judgment action. The latter permits adjudication of an issue of law on behalf of a person like the petitioner, concededly of good character and of law-abiding habits, without the necessity of arrest, confinement and severance from his family, friends and employment.

2. *Review is not precluded under Section 10 of the Administrative Procedure Act.*

Apart from actions under the general Declaratory Judgment Act (28 U. S. C. 2201) which authorized review in an immigration case in the *Kristensen* case, the Administrative Procedure Act's Section 10 (5 U. S. C. 1009) authorizes the maintenance of the action herein.

Section 10 provides:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Right of Review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (f) Form and Venue of Action—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgment or writs of prohibitory or mandatory injunction or *habeas corpus*) in any court of competent jurisdiction. • • •"

It is clear from the wording of Section 10 (b) of the Administrative Procedure Act that habeas corpus is one form of judicial review. Concededly, habeas corpus is available to test improper administrative action in immigration cases. How then can it be said that the immigration statutes preclude judicial review, when habeas corpus, a form of judicial review under the Administrative Procedure Act is available? When this is considered against the background of the Act, the answer becomes clearer.

"Very rarely do statutes withhold judicial review," and to "preclude judicial review under this bill a statute if

not specific in withholding such review, must on its face give clear and convincing evidence of an intent to withhold it" are the two guiding principles enunciated by the framers of the Administrative Procedure Act. (*Senate Document, No. 248,* 79th Cong., 2d Sess., 212, 275.) In *Estep* v. *United States,* 327 U. S. 114, the immigration decisions including *Geigow* v. *Uhl* were cited as examples of the types of cases where judicial review was not precluded even though Congress was silent upon the subject.

Section 10, read against this background, permits and authorizes judicial review in immigration cases. The single exception to Section 10(b) is where there is some adequate "special statutory review proceeding," i.e., those "wholly created by statute." (*Senate Document, 248, supra,* pp. 212-213, 276.) But no *special statutory proceeding* is provided for the review of immigration decisions and of course, habeas corpus is not a "special statutory review proceeding." It is not even mentioned in the 1917 Immigration Act. In enacting Section 10, Congress observed:

> "• • • The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action." (*Senate Document, 248, supra.*)

Obviously, if a declaratory judgment action to determine the validity or application of agency action is proper before the statutory form of review, *a fortiori,* such form of action is proper where no statutory review proceeding exists. Thus, by Section 10's inescapable mandate, a declaratory judgment action may be maintained in immigration cases. And, the lower courts which have exhaustively considered this problem, have reached a similar conclusion. *U. S. ex rel, Trinler* v. *Carusi,* 166 F. 2d 457 (C.A. 3, 1948); *Kristensen* v. *McGrath,* 179 F. 2d 796 (C.A. D.C. 1949);

Prince v. *Commissioner*, 185 F. 2d 578 (C.A. 6, 1950). We submit that these decisions should be followed.

3. *The Legislative History of the 1952 Immigration Act reaffirms the conclusion that Declaratory Judgment is available.*

This case is controlled by the 1917 Immigration Act which was in force when the action was instituted. It is pertinent, however, to review the legislative history of the 1952 Immigration Act (66 Stat. 163; 8 U. S. C. A. 1101, *et seq.*), effective December 24, 1952, as it reveals the Congressional understanding of this subject. That history shows quite clearly, that representatives of the American Bar Association, one of the militant proponents of the Administrative Procedure Act, believed that the early drafts of the McCarran-Walter Act would eliminate *existing* judicial review under Section 10 of the Administrative Procedure Act. The final version of the McCarran-Walter Act, was therefore brought in line to conform with Section 10—the law as it prevailed prior to December 24, 1952.

(a) S. 716 and H. R. 2379 of the 81st Congress, 1st Session were the first of a series of bills which later became the 1952 Immigration Act. Section 106 of these bills permitted no judicial review of findings of fact or of discretion. Determinations of law were "not to be subject to review by any court except through the writ of habeas corpus." Several organizations including the American Bar Association objected to these provisions of Section 106. The American Bar Association representative testified:

> "We believe that determinations of immigration and naturalization matters as well as citizenship matters should be subject to judicial review provided by Section 10 of the Administrative Procedure Act." *Joint Hearings before the Sub-Committees of the Committees of the Judiciary on S. 716, H. R. 2379, H. R. 2816*, pp. 536-537.

Thereafter Section 106 was eliminated.

(b) In *House Report 1365* (82nd Congress, 2nd Session) p. 28, reporting out the 1952 Immigration Act, the House Committee announced that the bill "safeguards judicial review."

(c) *Conference Report 2096* (82nd Congress, 2nd Session), p. 127, on the 1952 Immigration Act declares:

> "Having extensively considered the problem *of judicial review, the conferees are satisfied that procedures provided in the bill . . . remain within the framework and the pattern of the Administrative Procedure Act.*" (Italics supplied.)

(d) When the bill was debated on the floor of the House of Representatives, Congressman Francis Walter, co-author of the bill and the Administrative Procedure Act declared (98 Cong. Rec., Daily Edition, 4483):

> "*Now we come to this question of finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned,* but it is not final in that it is not the last remedy that the alien has. *Section 10 of the Administrative Procedure Act is applicable.*" (Italics supplied.)

See also: *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C.A. D.C., 1953).

Thus, it appears, that when Congress enacted the McCarran-Walter Act, its sponsors, who were also the sponsors of the Administrative Procedure Act, believed that administrative finality in immigration matters did not preclude judicial review. Significantly, the finality provisions of the McCarran-Walter Act (66 Stat. 200, 210; Sections 236-c and 242-b) are worded precisely the same as the finality provisions of earlier immigration statutes because Congress believed that judicial review of immigration matters *remained within the framework* of Section 10 of the

Administrative Procedure Act where it had always been since 1946, when that Act became law.

Point III

The Hearing Failed to Comply with the Immigration Statute and Was Invalid

If the Court sustains the jurisdiction of the courts below, then the merits of the controversy become important. In seeking certiorari, petitioner assumed that the *Heikkila* case was controlling, that this Court might not desire to reexamine the doctrine of that case so soon, and that it might even reverse the Court of Appeals below without hearing oral argument, upon the basis of the *Heikkila* doctrine. Accordingly, the petition herein while making mention of the merits, devoted itself to the jurisdictional issue. The Government on the other hand in opposing certiorari devoted itself exclusively to the merits. It was only when this Court granted certiorari and set this matter down for oral argument, that counsel realized that reexamination of *Heikkila* might be warranted.

Under these circumstances, should *Heikkila* be reversed, it would be in the interests of justice to consider the merits herein, which may otherwise be before the Court by reason of the Government's argument in opposition to certiorari. This Court will in the interests of justice consider new issues not raised below. *Hormel* v. *Helvering*, 312 U. S. 552, 556-559 (1941). In considering the merits herein, the Court need not go so far, as the merits were considered below and raised by the Government in this Court.

Petitioner seeks admission to the United States as the alien son of an American Veteran of World War II. If he is the son of Tom Wing, a citizen and a veteran, he is entitled to entry to our shores pursuant to 8 U. S. C. 232

which waives documentary, quota, and physical requirements of the immigration laws for such aliens who apply for admission between December 28, 1945 and December 28, 1948.

Petitioner sought admission to the United States upon his arrival on November 27, 1947 (R. 2). He was accorded a hearing before a three-man Board of Special Inquiry on January 22, 1948 at San Francisco where permanent Boards of Special Inquiry are stationed (R. 2). At this hearing the Board of Special Inquiry was composed of:

Inspector, L. H. Sinclair, Chairman;
Acting Inspector, Paul Armstrong;
Secretary-Stenographer, Luba Brondz, Member.

A resumed hearing was held on February 24, 1949 at which time no evidence was adduced other than the introduction of 7 exhibits. The following changes occurred in the composition of the Board (Immigration File of Petitioner, lodged with the courts below, Minutes pp. 1, 2, 3, 24, 25):

Inspector Henry Hamm replaced Inspector Paul Armstrong; M. Louise Elliott, Clerk-Stenographer, replaced Luba Brondz as Board Member and Secretary.

Inspector Sinclair who alone heard all the evidence and participated in the vote to exclude, Inspector Hamm and Clerk-Stenographer Elliott both of whom heard no evidence whatsoever, voted unanimously to exclude petitioner. On February 24, 1949 the minutes of both hearings were certified by M. Louise Elliott as "Clerk-Stenographer", (her civil service classification).

(A) The Board was improperly composed

The immigration statute (8 U. S. C. 153) provides that a Board of Special Inquiry "shall consist of three members, who shall be selected from such of the immigration officials in the service as the Commissioner of Immigration and

Naturalization with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards." When permanent Boards are not maintained, then "government officials and or other persons shall be eligible for service on such boards."

The regulations (8 C.F.R. 60.29) issued under the statute provide that (1) immigrant inspectors, (2) all other employees assigned to act as secretaries of boards of special inquiry and (3) other persons (preferably government employees) may serve as members of a Board of Special Inquiry.

In the instant case, it is admitted that permanent Boards of Special Inquiry were warranted and maintained at San Francisco (R. 4). Reading the regulations in conjunction with the statute it is clear that the Board of Special Inquiry must be composed of *immigrant officials* where permanent boards of special inquiry are maintained as was the case here in San Francisco where the appellant arrived. The only type of immigrant official designated by the regulations are "immigrant inspectors or those designated as immigrant inspectors."

The statutes and regulations permit the utilization of other government employees including secretaries or stenographers only where there is no permanent Board of Special Inquiry. Such is not the case at the Port of San Francisco. Thus in *Ex parte Sakaguchi*, 277 Fed. 913 (C.A. 9, 1922) it was assumed that permanent boards were not warranted and that a stenographer was authorized under the phrase "other persons".

In *Ex parte Sakaguchi*, the Ninth Circuit Court of Appeals said at pages 914-915:

> "We may assume from the record that in the opinion of the Secretary of Labor the maintenance of a permanent Board of Special Inquiry for service at Seattle was not warranted, that it was impracticable to detail

regularly constituted boards from other stations for temporary service at that port, and that in pursuance of the authority conferred upon him by section 17, the Secretary authorized the creation of a board of inquiry at that port, and determined that the two immigration inspectors and the stenographer should be eligible for service on the board, *the stenographer* being included in the *term "other persons" as used in the statute.* Nothing appears in the record to show that these assumptions are not justified. Such being the case, we find no ground for holding that the board was not legally constituted." (Italics supplied.)

On the other hand, *U. S. ex rel Minuto* v. *Reimer*, 83 F. (2d) 166 (C.A. 2, 1936) following the district court decision in *Ex parte Tomimatsu*, 232 Fed. 376 (N.D. Cal. 1916) decided without detailed analysis that an immigration clerk may be designated as an immigration official and act as a member of a board of special inquiry at the port of New York. The decision does not indicate whether permanent boards were then stationed at New York. It should be noted that *Ex parte Tomimatsu* (N. D. Calif., 1916) *supra*, is qualified by the Ninth Circuit ruling in the *Sakaguchi* case. In *Dong Ying Fun* v. *Nagle*, 5 F. (2d) 310 (C.A. 9, 1925), the objection here raised was not presented. There the objection was to the fairness of having a stenographer act in a dual capacity—not to her qualifications under the statute.

Significantly 8 U. S. C. A. 108, 109 *contrasts clerks* with immigration officers and officials and it is submitted that a clerk-stenographer is not an immigrant official under the statute.

In *United States* v. *Maurice*, 2 *Brock.* 96, 26 Fed. Cases No. 15,747 (C.C. Va. 1823) Mr. Justice Marshall said:

> "Although an office is an employment, it does not follow that every employment is an office."

Mitchel v. *Metcalf*, 269 U. S. 514 (1926) held that a consulting engineer was not an officer under the War Revenue Act of 1917 and *Butler* v. *The Regents of the University*, 32 Wisc. 124 (1873) held that a professor in a state university was not considered a public officer.

Heiliger v. *City of Sheldon*, 236 Iowa 146, 154, 155 (1945) properly analyzes the problem as follows:

> "The term 'public officer' or 'public official' has received broad, narrow, and widely varying definitions, by numerous courts. One may find a definition which will fit almost any particular instance * * *. 'As before stated, in the several relations in which they are used, different elements may be involved. Therefore, in order to determine the meaning of these words in a given case regard must be had to the intent and subject matter of the law wherein they are employed. In ascertaining their meaning technical rules should be avoided, and courts should not be too precise in seeking for words and definitions' 2 McQuillin Municipal Corporations, sect. 436 * * * Among the essentials of public office there noted are the delegation to the office and its occupants of some of the sovereign functions, powers, duties, and trusts of government, the authority to direct, supervise, to perform duties with more or less independence of superior control. There is entrusted to the office and the officer a portion of the sovereign power of government."

In 42 *American Jurisprudence* 882, 889, 890, the following observations are made about public officials:

> "The duties must not be merely clerical, or those only of an agent or servant but must be performed in the execution or administration of the law, in the exercise of power and authority bestowed by law.
>
> * * *
>
> But there is a distinction between public office and public employment, which is not always clearly marked

by judicial expression and is frequently shadowy and difficult to trace. * * * Although every public office may be an employment, every public employment is not an office and the word 'employee' as used in statutes has in many cases been construed as not including officers."

Boards of Special Inquiry consist of three members since the Act of March 3, 1903 (32 Stat. pt. 1, p. 1213). Previously under the Act of March 3, 1893 (27 Stat. 570) "four officials acting as inspectors would comprise the Board" and a vote of three was necessary for admission of the alien. *Clark, Boards of Special Inquiry, Monthly Review, Immigration and Naturalization Service*, March 1952, p. 116. Thus historically, it was contemplated since 1903 that three immigrant inspectors rather than four sit in judgment in every exclusion case where practical.

As early as 1911, complaint was made with reference to the personnel of the Board.

"The boards exercise a power which if not properly used may result in injustice to the immigrant or, through the admission of undesirable aliens, in harm to the country. It is important, therefore, that these boards should be composed of unprejudiced men of ability, training and good judgment." *Senate Document No. 747, 61st Congress, 3rd Sess., Vol. I, p. 32 (1911).*

"The most serious problems of exclusion hearings are problems of personnel. * * * Every district apparently has its 'misfits'; we were several times told that the board of special inquiry is the best place to dispose of such persons. 'We tell them just to sit and keep their mouths shut'—a warning, needless to say, given not to the chairman of the board, who does practically all of the questioning, but to the second and third members." *Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service* (1940) p. 51.

This, then, is the background of Boards of Special Inquiry, reduced by administrative fiat of the Immigration Service, to two or even one Board member, instead of the three prescribed by statute.

If a typist-stenographer, or a clerk-stenographer in the employ of the Immigration Service is an immigrant official, so are the charwoman, messenger, handyman, chauffeur, janitor and all other menial employees who receive salary checks chargeable to the appropriations of the Immigration Service. Surely, Congress did not contemplate that the Attorney General could designate them as *immigration officials* qualified to sit on a Board of Special Inquiry with power to cast a vote to exclude the alien son of a world war veteran or to decide the legal issues involved in citizenship, and expatriation cases which come before such Board.

M. Louise Elliott was a Clerk-Stenographer with no qualifications other than that possessed by the ordinary stenographer or clerical employee in the Immigration Service. The Civil Service qualifications for a Clerk-Stenographer prescribe physical ability, and typing as well as stenographic experience and little more. (See: General Schedule 312—Clerk-Stenographer Subseries, Civil Service Commission.)

It is clear that the duties of a clerk-stenographer are merely clerical and were not entrusted with the sovereign power of government granted to immigrant officials who are authorized to arrest, exclude and deport aliens. (See: *Federal Register*, May 24, 1952, p. 4737 et seq.) The statute does not warrant appointment of such individual as a member of the Board even where permanent boards are not maintained and the regulations are in excess of the statutory authorization, *Skinner and Eddy Corp.* v. *United States*, 249 U. S. 557, 562 (1919); *Manhattan Co.* v. *Commissioner*, 297 U. S. 129 (1936).

(B) *The Defective Composition of the Board Was Jurisdictional*

Attention will be directed in Point V to the unfairness of permitting two members of the Board to vote to exclude when they failed to hear testimony. At this point, we are concerned with the invalidity of the hearing because the Board included a Clerk-Stenographer as a voting member. The statute requires a board of three members (8 U. S. C. 153).

Congress has prescribed that interference by injunction with the enforcement of state or federal legislation pursuant to 28 U. S. C. 2282 requires "the adequate hearing and full deliberation which the presence of a court composed of three judges, as provided by the statute, was likely to secure." *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 14 (1930). The decision of a court of less than three judges in such a case, is a nullity for want of jurisdiction. *Stratton* v. *St. Louis Southwestern, supra.*

In *General Broadcasting System* v. *Bridgeport B. Station*, 53 F. (2d) 664, 668, (D. Conn., 1931) it was said:

> "The field of the superior body being narrower under the express provisions of the act, the matter is one for the application of the rule that acts of an administrative body which do not clearly come within the powers granted to it by the legislature are void."

And in *Heitmeyer* v. *Federal Communications Commission*, 95 F. (2d) 91, 100 (C. A. D. C., 1937) the court declared:

> "Proper administration of the law by governmental agencies such as the Communications Commission requires careful observance of the procedures established by Congress. For the protection of the people generally, to say nothing of the agencies themselves, convenience of administration cannot be permitted to justify non-

> compliance with the law, or the substitution of fiat for adjudication."

In the instant case, the government disregarded the statutory mandate which required three immigrant officials to sit on a Board of Special Inquiry. Convenience of administration resulted in placing a stenographer on the Board as a third member—but such convenience cannot justify noncompliance with the law.

Contrary to the holdings below in the instant case that a Board of two validly appointed members complies with the statute, is the ruling in *U. S. ex rel. Pazos* v. *Redfern*, 180 Fed. 500 (C. C. E. D. La., 1910). There, the court held that where one of the three inspectors had also been the examining inspector who held the alien for a Board of Special Inquiry, he was ineligible to sit and the Board was improperly constituted. The Circuit Court in the *Redfern* case said:

> "It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe the law contemplates that the inspector who makes the preliminary examination shall serve on the board of special inquiry and I must hold in this case that the board which denied to petitioner the right to land was illegal and without power."

Because of the importance to the immigrant and to the country (*Senate Document* 747, 61st Cong. *supra*), Congress prescribed that a Board of three immigrant officials hear and deliberate the admissibility of aliens seeking entry to our shores. Deliberation by a chairman with two dummy yes-men who hear no oral testimony, ask no questions and exercise no independent judgment as the Clerk-Stenographer, M. Louise Elliott and Inspector Hamm did in the

instant case, was not the procedure contemplated by Congress. A board thus composed was not a three man board of immigration officials but rather a board of two immigration officials, and a stenographer. It violated the requirements of the statute and had no authority to act, and its decision was beyond its jurisdiction. Like a three judge court composed of less than the prescribed number, its decision is a nullity.

(C) *The Defective Composition of the Board Has Been Properly Raised*

The courts below held that (1) the Board was properly composed (2) that in any event two members voted to exclude and their decision was valid and (3) that this objection to the Board's composition must fail because it was not raised administratively (R. 10, 15). We believe that the Board was improperly composed and that the presence of two immigration officials did not satisfy the statute for the reasons noted above. We further submit, that the defect being jurisdictional may be raised at any time. No question is raised of exhaustion of administrative remedies. Petitioner pursued his case to the final authorities in the exclusion process—The Board of Immigration Appeals.

Jurisdictional defects may be raised for the first time, in the Supreme Court. *McGrath* v. *Kristensen*, 340 U. S. 162, 167. Certainly, where administrative remedies have been exhausted, as here, and the administrative agency has assumed jurisdiction, as here, jurisdictional defects may be raised in the District Court for the first time. Subsequent to the institution of suit herein and the decisions below, all issues were raised administratively. On August 11, 1953, the Board of Immigration Appeals ruled that they lacked merit. A copy of the Board's decision is annexed herein as Appendix "B".

In view of this administrative ruling, to postpone decision here until petitioner made the futile gesture of raising the objection administratively as he now has, would be to indulge in a "delaying formalism" and "idle form", a type of nugatory act with which courts dispense. *C. A. B.* v. *Modern Air Transport*, 179 F. (2d) 622, 625 (C. A. 2, 1950); *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165, 167 (S. D. N. Y. 1924); *Smith* v. *Cahoon*, 283 U. S. 553, 562 (1931); *Lovell* v. *City of Griffin*, 303 U. S. 444, 452-453 (1938); *Montana Nat. Bank of Billings* v. *Yellowstone Co.*, 276 U. S. 499, 505 (1928).

It should also be observed that the general rule is that jurisdictional defects may be raised judicially without exhaustion of administrative remedies. *Gonzales* v. *Williams*, 192 U. S. 1, 15 (1904); *United States* v. *Sing Tuck*, 194 U. S. 161 (1904); *Skinner and Eddy Corp.* v. *United States*, 249 U. S. 557, 562 (1919); *Public Utilities Comm.* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943); *Federal Power Commission* v. *Panhandle Co.*, 337 U. S. 498, 515 (1949); *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, 197 (1913); *Varney, et al.* v. *Warehime, et al.*, 147 F. (2d) 238, 243 (C. A. 6, 1945); *U. S. ex rel. De Lucia* v. *O'Donovan*, 178 F. (2d) 876 (C. A. 7, 1950); *Chambers* v. *Robertson*, 183 F. (2d) 144, 146 (C. A. D. C. 1950); and cf. *U. S. ex rel. Bradley* v. *Watkins*, 163 F. (2d) 328 (C. A. 2, 1949).

Where objections must be raised administratively as a prerequisite to judicial action, Congress or the agency has expressly noted such fact in rules or statutory language. 15 U. S. C. 77(i)(a) (Securities Act); 29 U. S. C. 160(e) (National Labor Relations Act); *Democrat Printing Co.* v. *Federal Communications Commission* (F. C. C. Regulations, 202 F. 2d 298, C.A.D.C., 1952). There is no such provision either in the immigration statutes or regulations.

In *habeas corpus* proceedings, attack has been permitted

prior to the exhaustion of administrative remedies. *Gonzales* v. *Williams, supra* and *U. S. ex rel. Bradley* v. *Watkins, supra.* And see: 42 *Am. Juris.* 515, 517.

In divorce and denaturalization cases, collateral jurisdictional attack upon judicial decrees has been permitted without requiring prior objections in the proceedings under attack. *Sherrer* v. *Sherrer,* 334 U. S. 343 (1948); *Williams* v. *North Carolina,* 325 U. S. 226 (1945); *Bindczyck* v. *Finucane,* 342 U. S. 76 (1951); *United States* v. *Sotis,* 131 F. (2d) 783 (C. A. 7, 1942); *U. S. ex rel. Volpe* v. *Jordan,* 161 F. (2d) 390 (C. A. 7, 1947). Collateral jurisdictional attack upon administrative decrees should be no less sacrosanct than similar onslaughts upon judicial judgments.

Moreover, the government's delay in raising objection to petitioner's contention that the Board was defectively composed has prejudiced petitioner. The complaint and the pre-trial memorandum raised the objection of the Board's improper composition (R. 1, 5). Neither the answer nor the pretrial memorandum (R. 4, 5) raised the contention that this objection should have been raised administratively. It was therefore waived by the government. *Tucker* v. *Alexander,* 275 U. S. 228 (1927). The pre-trial memorandum controlled the future course of proceedings. *Rules of Civil Practice, Rule 12; Fowler, et al.* v. *Crown-Zellerbach,* 163 F. (2d) 773, 774 (C. A. 9, 1947); *King* v. *Edward Hines Lumber Co.,* 68 F. Supp. 1019 (D. Oregon, 1946); 1 *Barron & Holtzoff, Federal Practice and Procedure,* 964; *Nims, Pre-Trial,* 164. Had this issue been raised prior to trial, petitioner might have withdrawn his complaint and raised the objection administratively. It was improperly considered at the trial to petitioner's prejudice in violation of the pre-trial order.

Finally, it should be observed that where there has been a failure to exhaust administrative remedies, the procedure has not been to foreclose petitioner but to permit resort to

the administrative process. *S. S. W., Inc.* v. *Air Transport Association*, 191 F. (2d) 658 (C. A. D. C. 1951); *Gusik* v. *Schilder*, 340 U. S. 128 (1950).

Point IV

The Hearing Was Invalid for Failure to Comply With the Administrative Procedure Act

The complaint alleges (R. 2), and there is no dispute, that the Board of Special Inquiry was subject to the control of officers of the Immigration Service who were engaged in investigatory functions in violation of 5 U. S. C. 1004 and that the Board did not consist of hearing officers appointed pursuant to 5 U. S. C. 1010. The court below found that Boards of Special Inquiry are exempt pursuant to 5 U. S. C. 1006(a). Three questions are raised under this issue:

> (A) Are Boards of Special Inquiry subject to the hearing examiner requirements of 5 U. S. C. 1010 or within the exemption of 5 U. S. C. 1006(a)?
>
> (B) Does the exemption relieve Boards of Special Inquiry from the requirement of separating functions pursuant to 5 U. S. C. 1004(c)?
>
> (C) Are Boards of Special Inquiry exempt from 5 U. S. C. 1004(c) because exclusion cases involve initial applications for a license?

(A) *Hearing Examiners.* Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) requires special hearing examiners in cases of adjudications required by statute. These hearing examiners are to be assigned to cases in rotation, perform no inconsistent duties, and are to receive compensation prescribed not by the agency but by the Civil Service Commission. Section 7 (5 U. S. C. 1006) of the Act exempts from Section 11 "specified classes of proceedings . . . by or before boards or other officers specially provided for by or designated pursuant to statute."

The Section 7 exemption "does not mean that agencies are authorized—whether pursuant to the express authority of other statutes or not—to avoid the examiner system—set up in this bill . . . by assigning general employees or attorneys to hear cases individually or as boards. In short, unless the agency or its members or *some specially qualified statutory officer* hears the case, an examiner qualified under Section 11 of this bill must do so." (Congressman Walter, *Senate Document No. 248*, 79th Congress, 2nd Session, p. 364. See also p. 268 and *Attorney General's Manual on Administrative Procedure Act*, pp. 71-72.)

56 *Yale Law Journal* 701 states:

> "The committee reports indicate that the exemption should be strictly construed, and in particular that statutory provisions authorizing the use of employees or attorneys generally should not be considered authorization for exemption. However, some statutory boards listed by the Attorney General in the Senate Report as examples of the exempted class seem to fall within the group which the reports indicate is not exempted. The apparent conflict can only be resolved on the grounds that the statutes setting up these boards did not authorize the use of employees generally but rather specified that their members should be selected from among eligible employees designated as such by the agency head."

The article concludes that exemption can be granted to exclusion proceedings only on the basis that members of Boards of Special Inquiry are selected not from employees generally but because of their special qualifications. In the instant case, the immigrant inspectors who sat were not required to have any special training as lawyers but were merely required to pass a general aptitude test to qualify for their office. Under the regulations, 8 C. F. R. 60.27, patrol inspectors, and under 8 C. F. R. 60.29(c) anyone in and out of the government may serve on a Board of Spe-

cial Inquiry regardless of experience or training. The secretary who sat as a Board member merely had stenographic experience with the Immigration Service and listed herself as a Clerk-Stenographer.

As long as stenographers can sit as Board of Special Inquiry members—and this was the practice rather than the exception—as long as persons outside the Immigration Service may sit—individuals without special qualifications other than those possessed by employees generally, and non-employees, are performing the duties of hearing examiners. Boards so composed are not within the exemption of Section 7 of the Administrative Procedure Act. *U. S. ex rel. Saclarides* v. *Shaughnessy*, 180 F. (2d) 687 (C. A. 2, 1950), and *U. S. ex rel. Frisch* v. *Miller*, 181 F. (2d) 360 (C. A. 5, 1950) decided merely that Boards of Special Inquiry composed of specially qualified immigrant inspectors, as required by statute were exempt from the hearing requirements of the Administrative Procedure Act. Such is not the case here because of the improper composition of the Board. It is therefore submitted that Boards of Special Inquiry not composed of three specially qualified immigration officials are not within the exemption of 5 U. S. C. 1006(a).

(B) *The Exemption of 5 U. S. C. 1006(a) Does Not Relieve Boards of Special Inquiry from the Requirements of 5 U. S. C. 1004(c).* In its brief in the Supreme Court in *Sung* v. *McGrath*, 339 U. S. 33, the Government conceded that the exemption of 5 U. S. C. 1006(a) for certain statutory hearing officers "is not necessarily an exemption from all of the provisions of Sections 5, 7 and 8" of the Administrative Procedure Act (Brief, p. 45).

The *Attorney General's Manual on the Administrative Procedure Act* p. 72 states that in cases where the exemption of 7 (a) of the Administrative Procedure Act (5 U. S. C. 1006 (a)) is invoked, Section 5(c) (5 U. S. C. 1004(c)) requiring separation of functions is inapplicable only if in-

consistent with the exemption. The Government's brief in the *Sung* case states (p. 44):

> "Also, the express exemption of Section 7(a) for certain statutory hearing officers necessarily carries with it as much of an exemption from the general separation of functions requirement of Section 5(c) as is necessary to give effect to the express exception."

In the *Saclarides* and *Frisch* cases, *supra*, no question was raised or decided with regard to separation of functions. It is submitted that there is nothing in the immigration statute or 5 U. S. C. 1006(a) which warrants an exemption from 5(c) (5 U. S. C. 1004(c)) for Boards of Special Inquiry and that the hearing herein was invalid because of failure to separate functions.

(C) *Do Exclusion Cases Involve Initial Applications for a License Exempting Boards of Special Inquiry from 5 U. S. C. 1004(c).* Heretofore, the Government has acknowledged that the hearing before a Board of Special Inquiry is a hearing subject to 5 U. S. C. 1004(c) but has asserted the novel view that the admission of aliens "seemed to fall within the (exempting) provisions of section 5(c) relating to initial licenses" (*House Report 2140, 80th Congress, 2nd Session* p. 4). Until now, neither the Courts nor the Government have ever referred to the application for admission of an alien as an application for an "initial license." Generally the initial permission to enter the United States is granted by an American Consul abroad. The Immigration Service rechecks the alien's admissibility. There is no provision in our immigration statutes authorizing the Commissioner to issue licenses to aliens seeking admission to our shores. The statutes do not contemplate a licensing procedure. Furthermore, the Immigration Service does not treat an alien, once admitted, as though he has received a license. Section 9 of the Administrative Procedure Act requires notice to the licensee prior to revocation of a

license with an opportunity to achieve compliance with the requirements of law. On the contrary, the regulations governing visitors consider a visa cancelled forthwith upon evidence of an intention by words or action to violate the terms of admission. [Federal Register, May 15, 1948; 8 C. F. R. 119.5(c).]

In *Door* v. *Donaldson*, 195 F. 2d 764 (C. A. D. C. 1952) decided January 31, 1952, the Court said:

> "In our opinion, the Act exempts from the requirement of a full hearing, because they 'rest solely on inspections,' only decisions that turn either upon physical facts as to which there is little room for difference of opinion, or else upon technical facts like the quality of tea or the condition of airplanes, as to which administrative hearings have long been thought unnecessary."

In line with this decision it seems clear that exclusion procedures do not turn on physical technical facts concerning which administrative hearings have long been thought unnecessary. On the contrary, administrative hearings have been granted in exclusion cases ever since the inception of our Federal immigration laws.

It is therefore submitted that the hearing herein violated the Administrative Procedure Act and was null and void. *Bogiatzis* v. *Hall*, 195 F. (2d) 661 (C. A. 4, 1952).

Point V

The Hearing Was Unfair.

The immigration statute 8 U. S. C. 152, 153 accords an arriving alien the privilege of a hearing and there is no dispute that he is entitled to a fair hearing. *Kwock Jan Fat* v. *White*, 253 U. S. 454 (1920); *U. S. ex rel. Brandt* v. *District Director*, 40 F. Supp. 371 (S. D. N. Y. 1941); *Monthly Review, Immigration and Naturalization Service*, February, 1947 p. 101. The appellant was not accorded a fair hearing.

The Changes in Board Personnel Rendered the Hearing Unfair

Chinese cases like the instant one, involving disputed paternity or identity, generally turn upon credibility of the applicant for admission to the United States. Determinations of credibility by the administrative agency are not upset by the courts upon the ground that those who heard the witness are in the best position to judge his credibility. *Gin Soon Ging* v. *Carmichael*, 123 F. (2d) 72 (C. A. 9, 1941); *Woon Sun Seung* v. *Proctor*, 99 F. (2d) 285 (C. A. 9, 1938); *Ex parte Keizo Kamiyama*, 44 F. (2d) 503 (C. A. 9, 1930).

In the instant case, the demeanor of the petitioner was observed administratively by one board member, Chairman Sinclair. The other board members (Hamm, and Clerk-Stenographer Elliott) were not present during any oral testimony whatsoever. Inspector Sinclair dominated the hearing, asked all questions, acted as prosecutor and judge and finally moved for the exclusion of appellant in which motion his straw board members concurred. (Minutes pp. 2, 13, 19, 23, 31) Throughout the written record prior to the appointment of board members Hamm and Clerk-Stenographer Elliott, Chairman Sinclair had spread his views upon the record as to petitioner's credibility. He continually commented that petitioner's answers were strange or unreasonable for an eighteen year old boy (Minutes pp. 3, 4, 6, 12, 18, 19, 22) and then recorded his opinion that petitioner misstated his age as eighteen instead of sixteen. His disbelief in the stated age of petitioner was only dissipated when the age of petitioner was verified by the Public Health Service at the chairman's request. (Minutes pp. 12, 23, 24, Exhibit 17) He refused to believe that petitioner's father was the man he claimed to be until proofs were received from Cuba (Minutes p. 24, Exhibit 22). And finally, he would not permit the uncorroborated testimony of peti-

tioner and his father to establish paternity (Minutes p. 31).

This atmosphere, created by the chairman who dominated the proceeding in accordance with immigration practice was hardly conducive to a fair hearing. And it was the chairman alone who observed petitioner as he testified and he alone was in a position to judge demeanor and credibility. Under such circumstances it was held in *Ex parte Lee Bock Fook*, 40 F. Supp. 937, 940 (S. D. Calif. 1941) that a hearing was rendered unfair. There the court said:

> "* * * we think it to be of more than passing significance that two of the members of the Board of Special Inquiry which sat at the first hearing did not attend either the second hearing or the third hearing. Granting that we may assume that the officials who replaced these two original members of the Board reviewed the record of what had heretofore transpired, nevertheless it can not be deemed that the substitute members did not hear the applicant or his alleged brother, Lee Book Toy, or the fellow villager, and hence they were hardly qualified to pass on the credibility of those witnesses or the weight to be given to their testimony."

See also:

U. S. ex rel. Ohm v. *Perkins*, 79 F. (2d) 533 (C. A. 2, 1935);

Buschbaum & Co. v. *F. T. C.*, 153 F. (2d) 85, (C. A. 7, 1946) reversed upon other grounds 328 U. S. 819;

Davis, Administrative Law, pp. 343, 345.

Although the Second Circuit has held that change in the composition of the Board does not render a hearing unfair, where an issue of law was involved *U. S. ex rel. Minuto* v. *Reimer*, 83 F. (2d) 166 and the Ninth Circuit has so held in cases involving credibility *Hom Moon Ong* v. *Nagle*, 32 F. (2d) 470 (C. A. 9, 1929), we submit that the better rule is expressed in *Davis, Administrative Law*, as follows at p. 343:

> "When demeanor of witnesses is unimportant, there is clearly no harm in permitting a substitution of one hearing officer for another at any stage of the proceedings, or permitting a decision to be made on the record without a report from the hearing officer. When demeanor of witnesses is important, deciding without taking that factor into account is undesirable and may be unfair. Demeanor may be taken into account either by permitting the hearing officer to make the decision, or by having the hearing officer make a report to the deciding officer or officers, as is traditionally done when an equity court appoints a special master. But if the judge or hearing officer dies or is replaced before making a report, then when demeanor is deemed to be of sufficient importance the testimony should be heard again."

In the instant case, demeanor of witnesses and credibility were of crucial importance. The substitution of hearing officers therefore constituted a fatal defect in the proceedings.

Conclusion

If *Heikkila* v. *Barber*, 345 U. S. 229 (1953) is not overruled, then the decision below should be reversed and remanded for dismissal solely upon jurisdictional grounds. If *Heikkila* v. *Barber* is reversed, as we suggest, then the decision below should be reversed upon the merits upon the ground that the petitioner was not accorded a hearing which was fair and in conformity with controlling statutes.

Respectfully submitted,

JACK WASSERMAN,
Warner Building,
Washington 4, D. C.,
Attorney for Petitioner.

ANDREW REINER, ESQ.,
Of Counsel.

APPENDIX "A"

STATUTES AND REGULATIONS

The Declaratory Judgment Act, 28 U. S. C. 2201, directs that:

> "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such."

The Immigration Act of December 28, 1945, 59 Stat. 659, 8 U. S. C. 232 provides as follows:

> "Notwithstanding any of the several clauses of Section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulatons, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of December 28, 1945, be admitted to the United States: * * *"

Section 16 of the Immigration Act of February 5, 1917, 39 Stat. 885, 8 U. S. C. 152 provides:

> "Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry."

Section 17 of the Immigration Act of February 5, 1917, 39 Stat. 887; 8 U. S. C. 153 provides:

> "Boards of Special Inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. When in the opinion of the Attorney General the maintenance of a permanent board of special inquiry . . . is not warranted, regularly constituted boards may be detailed from other stations for temporary service at such port, or, if that be impracticable, the Attorney General shall authorize the creation of Boards of Special Inquiry by the immigration and naturalization officers in charge at such ports and shall determine what government officials or other persons shall be eligible for service on such boards. • • • In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General" • • •

Section 25 of the Immigration Act of 1917, 39 Stat. 893, 8 U. S. C. 164 provides in part:

> "The district courts of the United States are invested with full jurisdiction of all causes, civil and criminal, arising under any provisions of this Act."

8 C. F. R. 60.29 provides:

> "*Persons qualified as members of boards of special inquiry; oath.* In accordance with the provisions of

section 17 of the Immigration Act of 1917 (39 Stat. 887, 8 U. S. C. 153), the following persons are hereby designated as qualified and determined to be eligible to serve on boards of special inquiry:

(a) Immigrant inspectors, including persons designated immigrant inspectors by Sec. 60.27;

(b) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards for the purpose of keeping the complete permanent record of the proceedings and of all such testimony as may be produced; and

(c) Persons, other than employees of the Immigration and Naturalization Service but preferably Government employees, who are selected by an Immigration and Naturalization Service official in charge of a port where no permanent board of special inquiry is maintained and to which it is impracticable to detail a board from some other station. Such persons shall, before serving on a board of special inquiry, subscribe to an oath of office on Form I-266 before an immigrant inspector."

8 C. F. R. 60.27 provides:

"*Authority of patrol inspectors, special inspectors, naturalization examiners, and other officers to act as immigrant inspectors.* All persons serving under appointment heretofore or hereafter made as patrol inspectors, special inspectors, naturalization examiners, or other officers of the Immigration and Naturalization Service of a higher grade than patrol inspector, special inspector, or naturalization examiner are hereby designated immigrant inspectors without additional compensation. The work as immigrant inspectors shall be arranged by supervisory officers so as not to interfere substantially with the performance of the duties of the other positions."

Section 5 of the Administrative Procedure Act of June 11, 1946 (5 U. S. C. 1004) provides:

"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .

(c) *Authority and function of officers and employees.* The same officers who preside at the reception of evidence . . . shall make the recommended or initial decision . . . Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party or any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) provides:

"In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in part as follows:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) provides:

"Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission

independently of agency recommendations or ratings and in accordance with sections 661-663, 664-669, 670-672, 673, and 674 of this title, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 667 of this title, and the provisions of section 669 of this title, shall not be applicable."

APPENDIX "B"

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Aug. 11, 1953.

File: A-6935914—San Francisco (1300-66270)
In the Matter of TOM WE SHUNG

IN EXCLUSION PROCEEDINGS

In behalf of Appellant: Jack Wasserman, Esquire, Warner Building, Washington 4, D. C. (Heard June 18, 1953).

In behalf of Service: Sidney B. Rawitz, Service Representative (Heard June 18, 1953).

This case is before us on counsel's motion for reconsideration dated May 1, 1953. A suit was filed on behalf of the alien in the United States District Court for the District of Columbia, seeking a declaratory judgment and review under the Administrative Procedure Act. The complaint was ordered dismissed,[1] and the judgment of the District Court was affirmed by the United States Court of Appeals on July 2, 1953.

The appellant, who claims birth in China on June 1, 1929, applied for admission to the United States on November 28, 1947 under the Act of December 28, 1945 (59 Stat. 659) as the alien son of an honorably discharged veteran of World War II who had been naturalized on December 16, 1946. The board of special inquiry found that he was not the son of the alleged father. On July 21, 1949 we dismissed the

---

[1] *Tom We Shung* v. *McGrath et al.*, 103 F. Supp. 507.

appeal from the excluding decision and on December 1, 1949 we denied the motion for reopening and reconsideration submitted by the appellant's counsel.

Counsel concedes that a rehearing in an administrative proceeding lies within the discretion of the agency making the order and we find considerable merit also in the Service view that the objections which counsel now interposes should have been made when the case was before us in 1949. While we might deny counsel's motion on that basis, we have concluded, nevertheless, that the motion should be disposed of on the merits. Counsel's objections are that one of the board members was a clerk-stenographer; that there was a change in the personnel of the board between the taking of testimony and the final decision; that the board was not impartial and was subject to the control of those who investigate and prosecute and that the board of special inquiry did not comply with the Administrative Procedure Act.

With reference to the first objection, section 17 of the Immigration Act of 1917 contains nothing which would preclude the appointment of a clerk-stenographer as a member of a board of special inquiry. Under the regulations which were then in effect (8 C. F. R. 130.1 and 60.29), immigrant inspectors and persons designated as immigrant inspectors, and all other employees of the Service who were assigned to the duty of acting as secretaries of boards of special inquiry were designated as qualified and eligible to serve on such boards. The same question was raised in *Dong Ying Fun* v. *Nagle*, 5 F. (2d) 310 (C. C. A. 9, 1925), and the court held that the fact that one of the members of the board of special inquiry was a stenographer and kept the record of the proceedings and testimony was no ground for setting aside the findings of the board.

In connection with the objection relating to the change in the composition of the board of special inquiry, we note that L. H. Sinclair acted as chairman throughout the proceeding but that a substitution occurred with regard to the other two members when the hearing was resumed on February 24, 1949. At that time the two new members stated that they had familiarized themselves with all the evidence pre-

viously adduced in the case (p. 24). In *Dong Ying Fun* v. *Nagle, supra,* and in *Hom Moon Ong* v. *Nagle,* 32 F. (2d) 470 (C. C. A. 9, 1929), the courts rejected contentions based on changes which had occurred in the composition of boards of special inquiry between the commencement of the proceedings and the final disposition.

With regard to counsel's contention that the board of special inquiry was not impartial and his intimation that the board's decision was influenced by superior officers, we find no merit in these allegations and counsel has presented no supporting evidence. Likewise, we must reject his objection to the effect that the board of special inquiry did not comply with the Administrative Procedure Act in view of the decision in *U. S. ex rel Saclarides et al.* v. *Shaughnessy,* 180 F. (2d) 687, 689 (C. A. 2, 1950) in which the court held that exclusion proceedings were not subject to the hearing requirements of the Administrative Procedure Act. In addition, the Supreme Court has held that, where no objection was made before the agency to non-compliance with the Administrative Procedure Act, the validity of the agency's order cannot be judicially attacked on that ground. *United States et al.* v. *L. A. Tucker Truck Lines, Inc.,* 344 U. S. 33 (1952).

The objections which counsel seeks to raise before us were considered and disposed of adversely to him in the United States District Court. *Tom We Shung* v. *McGrath, et al., supra.* The Court of Appeals, in affirming that decision expressed agreement with the lower court's conclusions (1) that the board was properly constituted and, if not, the failure to make timely objection rendered that point unavailable and (2) that the hearings before the board were fair and its decision sufficiently supported by the evidence. The appellate court also stated that, while there might be a serious question as to the right of judicial review of an exclusion order, other than by habeas corpus, in view of the Supreme Court's decision in *Heikkila* v. *Barber,* 345 U. S. 229 (March 16, 1953), that question need not be considered since the appellant had been accorded the benefit of a full review and questions concerning the validity of the administrative proceedings had been considered and resolved

against him. In view of the foregoing, the following order will be entered.

ORDER: It is ordered that the previous orders of this Board relating to the appellant be and the same are hereby affirmed.

——— ———,
Chairman.

(1382)

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	4
Conclusion	5

CITATIONS

Cases:

Heikkila v. *Barber*, 345 U.S. 229	4, 5

Statutes:

Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*	2
Declaratory Judgment Act, 28 U.S.C. 2201	3
8 U. S. C. 232	2

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 14-15) is not yet reported. The memorandum opinion of the District Court (R. 7-9) is reported *sub nom. Tom We Shung* v. *McGrath* at 103 F. Supp. 507.

BLEED THROUGH POOR COPY

JURISDICTION

The judgment of the Court of Appeals was entered July 2, 1953 (R. 16). The petition for a writ of certiorari was filed August 7, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Upon his arrival from China in November, 1947, twenty-year-old Tom We Shung, a Chinese alien (R. 10), sought admission into the United States at San Francisco, California under the provisions of 8 U.S.C. 232, as the blood son of one Tom Wing, an honorably discharged veteran of World War II who filed the present petition upon Shung's behalf (R. 1, 2). Following a hearing in January, 1948, and February, 1949, an immigration board of special inquiry at San Francisco, California, determined that Shung was inadmissible on the ground that he had not established that he was the blood son of Wing (R. 2). On appeal to the Board of Immigration Appeals, the exclusion decision was affirmed (R. 3).

Subsequently, in the United States District Court for the District of Columbia, petitioner filed an action, amended June 10, 1950, for review of the order under the Administrative Procedure Act (5 U.S.C. 1001 *et seq.*) and for a declaratory judgment that the hearing accorded him in San Francisco was unfair, null and void and that he was in fact Wing's blood son and admissible into the United States under 8 U.S.C. 232. He based his action on two principal grounds: (1) that the board of

special inquiry was improperly constituted in that it was composed of two immigration officials and a clerk-stenographer rather than three immigration officials, as allegedly required by law, and that it was not composed of hearing examiners appointed in conformity with the Administrative Procedure Act, and (2) that the board's finding that he was not Wing's blood son was not supported by any evidence whatsoever.

The Government's answer alleged that the board of special inquiry was properly constituted and that such boards were not required to be appointed in conformity with the Administrative Procedure Act. It denied that there was substantial evidence introduced at the hearing that petitioner was Wing's blood son (R. 4-5).

The District Court dismissed petitioner's action (R. 10-11), issuing findings of fact and conclusions of law (R. 9-10). It held that, since the Declaratory Judgment Act (28 U.S.C. 2201) allowed judicial review of the administrative determination here involved, it was unnecessary to consider the applicability of the Administrative Procedure Act. The court held that such review was limited merely to a determination of whether the board was properly constituted and whether it abused its discretion in making the determination in question since, by statute, the decision of a board of special inquiry was final. Thereupon the court found that the board was properly constituted; that in any event, petitioner waived any objection to the board's composition when he failed to object at the time of the

hearing; that petitioner had received a fair hearing; and that the evidence adduced at the hearing amply supported the board's determination. It ordered that the amended complaint should be dismissed (R. 7-10). On appeal, the Court of Appeals affirmed (R. 16). Agreeing with the lower court's findings, it further said (R. 15):

> The recent decision of the Supreme Court in *Heikkila* v. *Barber,* 345 U.S. 229 (March 16, 1953), may suggest a serious question as to the right of judicial review of an exclusion order except by the limited process of habeas corpus. However, as appellant has been accorded the benefit of a full review and questions concerning validity of the administrative proceedings have been considered and resolved against him, it is unnecessary for us to consider the question now.

ARGUMENT

Petitioner does not challenge the validity of the exclusion determination by the immigration board of special inquiry nor does he challenge the judgment of the court below affirming the dismissal of the complaint. His sole contention (Pet. 2, 5) is that in the light of this Court's decision in *Heikkila* v. *Barber,* 345 U.S. 229 (decided after the judgment of the District Court), the court below did not have jurisdiction in a declaratory judgment action to review the exclusion determination of an immigration board of special inquiry, and that it should have dismissed the action solely on the basis of lack of jurisdiction rather than on the merits. It is true

that under the *Heikkila* decision the appropriate way for petitioner to have challenged the order of exclusion would appear to be by writ of habeas corpus. It is also true that it was petitioner who sought relief by the declaratory judgment route, and that he actually obtained a review of the outstanding exclusion order which was at least as extensive, if not more so, than that which he would be able to obtain by habeas corpus. See *Heikkila* v. *Barber, supra,* at 235-236. In these circumstances, we see no need to disturb the decision of the court below.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
FELICIA H. DUBROVSKY,
Attorneys.

SEPTEMBER 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 [illegible]

BLEED THROUGH POOR COPY

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of Argument	6
Argument	12
I. The only issue before this Court is whether the judgment of the court below should be vacated and the case remanded to the district court for a dismissal of the complaint for want of jurisdiction	12
II. The judgment of the courts below should be vacated and the case remanded to the district court with instructions to dismiss the complaint for want of jurisdiction	15
A. The position of the respondents	15
B. The proper order of things	16
C. *Heikkila* v. *Barber*	17
D. Waiver or estoppel	19
III. Even if this Court were to reach the additional questions presented by petitioner's brief, the conclusions of the court below would be sustained	28
A. *Heikkila* v. *Barber* should not be overruled	28
B. Petitioner is precluded from raising the issue of improper composition of the board of special inquiry since he failed to object before that board	30
C. The board of special inquiry was not improperly constituted by reason of the fact that one of its members was a clerk-stenographer	32
D. The board of special inquiry was not improperly constituted by reason of change of personnel, and such substitution did not render the hearing unfair	37
E. Proceedings before the board of special inquiry were not governed by the Administrative Procedure Act	38
F. The administrative hearing was fair and the decision was amply supported by the evidence	42
Conclusion	45
Appendix	46

280854—53——1

CITATIONS

Cases: Page

Ahrens v. *Clark*, 335 U. S. 188 ..... 8, 21, 23, 27
Alexander v. *Hillman*, 296 U. S. 222 22
American Fire & Casualty Co. v. *Finn*, 341 U. S. 6 ..... 20, 25
Baggs v. *Martin*, 179 U. S. 206 24
Bailey v. *Texas Co.*, 47 F. 2d 153 25
Beck, United States ex rel. v. *Neeley*, 202 F. 2d 221, certiorari denied, 345 U. S. 997 31
Beyer v. *LeFevre*, 186 U. S. 114 22
Boyd v. *United States*, 271 U. S. 104 20
Brooks v. *Dewar*, 313 U. S. 354 17
Brownell v. *Rubenstein*, No. 300, this Term, certiorari granted, November 9, 1953 29
Capron v. *Van Noorden*, 2 Cranch 126 20
Case v. *Terrell*, 11 Wall. 199 21
Chang Chan v. *Nagle*, 268 U. S. 346 42
Chin Cheung Nai, United States ex rel. v. *Corsi*, 55 F. 2d 360, affirmed, 64 F. 2d 1022 37
DiGiovanni v. *Camden Fire Insurance Assn.*, 296 U. S. 64 22
Dong Ying Fun v. *Nagle*, 5 F. 2d 310 ..... 34, 37
Eastland Co. v. *Federal Communications Commission*, 92 F. 2d 467, certiorari denied, 302 U. S. 735 37
Empire Trails, Inc., v. *United States*, 53 F. Supp. 373 37
Ex parte Endo, 323 U. S. 283 22
Finn v. *United States*, 123 U. S. 227 21
443 Cans of Egg Product, 226 U. S. 172 21
Frisch, United States ex rel. v. *Miller*, 181 F. 2d 300 38
General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175 14
Grace v. *American Central Insurance Co.*, 109 U. S. 278 20
Handley-Mack Co. v. *Godchaux Sugar Co.*, 2 F. 2d 435 24
Healy v. *Ratta*, 292 U. S. 263 20
Heikkila v. *Barber*, 345 U. S. 229 ..... 2, 7, 8, 9, 13, 17, 19, 23, 28
Hom Moon Ong v. *Nagle*, 32 F. 2d 470 37
Hosaye Sakaguchi, Ex parte, 277 Fed. 913 34
Johnson v. *United States*, 318 U. S. 189 20
Johnson, United States ex rel. v. *Watkins*, 170 F. 2d 1009, reversed, *sub nom. United States ex rel. Johnson* v. *Shaughnessy*, 336 U. S. 906 38
Lombardo, United States ex rel. v. *Bramblett*, 114 F. Supp. 183 31
Louie Lung Gooey v. *Nagle*, 49 F. 2d 1016 37
Mansfield, C. & L. M. Ry. Co. v. *Swan*, 111 U. S. 379 ..... 16, 20
McGrath v. *Kristensen*, 340 U S 162 ..... 19, 21
McNutt v. *General Motors Acceptance Corp.*, 298 U. S. 178 20
Mercelis v. *Wilson*, 235 U. S. 579 22

Cases—Continued Page

Minuto, United States ex rel. v. *Reimer*, 83 F. 2d 166 ..... 34, 37
Mitchell v. *Maurer*, 293 U. S. 237 20
Momo Tomimatsu, Ex parte, 232 Fed. 376 ..... 34, 35
Morgan v. *United States*, 298 U. S. 468 37
Morris v. *Gilmer*, 129 U. S. 315 22
National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350 14
Neirbo Co. v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165 22
North Pacific Steamship Co. v. *Soley*, 257 U. S. 216 20
Perkins v. *Elg*, 307 U. S. 325 19
Quon Quon Poy v. *Johnson*, 273 U. S. 352 37
Robertson v. *Cease*, 97 U. S. 646 20
Saclarides, United States ex rel. v. *Shaughnessy*, 180 F. 2d 687 38
Schollenberger, Ex parte, 96 U. S. 369 22
Secretary of Agriculture v. *Central Roig Co.*, 338 U. S. 604 17
Sohaiby v. *Savoretti*, 195 F. 2d 139 42
Toledo, St. L. and W. R. Co. v. *Peranchio*, 205 Fed. 472 25
Tom We Shung v. *McGrath*, 103 F. Supp. 507 1
Treinen v. *Sunshine Mining Co.*, 308 U. S. 66 16
Twin City Milk Producers Assn. v. *McNutt*, 122 F. 2d 564 37
United States v. *Corrick*, 298 U. S. 435 21
United States v. *Griffin*, 303 U. S. 226 21
United States v. *Shaw*, 309 U. S. 495 21
United States v. *Tucker Truck Lines, Inc.*, 344 U. S. 33 ..... 9, 30, 31
United States v. *United States Fidelity Co.*, 309 U. S. 506 21
Vajtauer, United States ex rel. v. *Commissioner*, 273 U. S. 103 ..... 9, 31
Visveglia v. *United States*, 24 F. Supp. 355 37
Wah v. *Shaughnessy*, 190 F. 2d 488 38
West Indian Co. v. *Root*, 151 F. 2d 493 41
Wetmore v. *Rymer*, 169 U. S. 115 20
Wong So Wan, Ex parte, 82 F. Supp. 60 38
Wong Yang Sung v. *McGrath*, 339 U. S. 33 ..... 38, 41

Statutes:

Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001 *et seq.*) 3
Section 2 (c) 42, 46
Section 5 (c) 11, 41, 42, 46
Section 7 (a) 11, 38, 39, 42, 47
Section 10 (a) 30, 48
Section 11 ..... 39, 42, 48
Declaratory Judgment Act, 28 U. S. C. 2201 4
Immigration Act of 1917, as amended:
8 U. S. C. 108 ..... 34, 40
8 U. S. C. 109 ..... 34, 40

Statutes—Continued
Immigration Act of 1917, as amended—Continued Page
8 U. S. C. 152 ---- 33, 49
8 U. S. C. 153 ---- 10, 11, 34, 35, 39, 50
8 U. S. C., Supp. V, 155a ---- 41, 51
8 U. S. C. 202 (g) ---- 42
8 U. S. C. 232 ---- 3, 51
Immigration and Nationality Act of 1952 (66 Stat. 163) ---- 29
Section 101 (b) (4) ---- 36, 52
Section 235 (b) ---- 36, 52
Section 236 (a) ---- 36, 53
Section 287 (b) ---- 36
Immigration Act of February 20, 1907 (34 Stat. 898), Section 25 ---- 35
Miscellaneous:
Attorney General's Manual on the Administrative Procedure Act (1947), pp. 50–53 ---- 42
Boskey, *Jurisdiction and Collateral Attack*, 40 Col. L. Rev. 1006 ---- 22
Hart and Wechsler, *The Federal Courts and the Federal System* (1953), p. 719 ---- 16
Van Vleck, *The Administrative Control of Aliens*, p. 46 (1932) ---- 36
8 C. F. R. 60.29 ---- 10, 34, 53
92 Cong. Rec. 2152, 2154 ---- 40
S. Doc. No. 747, 61st Cong., 3d Sess., p. 46 ---- 35
S. Doc. No. 248, 79th Cong., 2d Sess ---- 40
S. Rep. No. 352, 64th Cong., 1st Sess., p. 13 ---- 36
S. Rep. No. 1515, 81st Cong., 2d Sess., p. 618 ---- 36
Supreme Court Rule 27 (6) ---- 14

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 14–15) is not reported. The memorandum opinion of the District Court (R. 7–9) is reported *sub nom. Tom We Shung* v. *McGrath* at 103 F. Supp. 507.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1953 (R. 16). The petition for a writ of certiorari was filed on August 7,

1953, and was granted on October 19, 1953 (R. 17). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, upon review of an exclusion determination of an Immigration Board of Special Inquiry by a federal district court in an action for a declaratory judgment—prosecuted by the alien over objection that habeas corpus is the only proper means of challenge—the merits of the judgment of the district court sustaining the exclusion may be considered by the court of appeals or whether the action must be dismissed by reason of lack of power of the court to review by declaratory judgment.[1]

STATUTE AND REGULATION INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 46–54.

STATEMENT

Tom We Shung, a Chinese alien (R. 10), sought admission into the United States on or about

[1] Petitioner based his petition for a writ of certiorari solely upon the ground that *Heikkila* v. *Barber*, 345 U. S. 229, limited review to habeas corpus and that dismissal without prejudice was accordingly required (Pet. 2, 4–5). After grant of the petition, petitioner has now injected into his brief additional, and basically inconsistent, arguments that *Heikkila* should be considered and reversed, and that the merits, instead of the narrow question of the court's power, should be reviewed. See *infra*, pp. 12–15. These new grounds are discussed *infra*, pp. 28–45.

November 28, 1947, at San Francisco, California, under the provisions of 8 U. S. C. 232 (Appendix, *infra*, pp. 51–52), as the blood son of one Tom Wing, an honorably discharged veteran of World War II (R. 1, 2). Hearings were held in January 1948 and February 1949 before an Immigration Board of Special Inquiry, which determined that Shung was inadmissible in that he had not established that he was the blood son of Wing (R. 2). On appeal to the Board of Immigration Appeals, the exclusion decision was affirmed (R. 3).[1a]

Subsequently, petitioner filed an action in the United States District Court for the District of Columbia, naming as respondents the Attorney General and the Commissioner of Immigration and Naturalization, for review of the order under the Administrative Procedure Act (5 U. S. C. 1001 *et seq.*) and for a declaratory judgment that the hearing accorded him in San Francisco was unfair, null and void and that he was in fact Wing's blood son and thus admissible. He based his action primarily upon the grounds: (1) the Board of Special Inquiry was improperly constituted in that it was composed of two immigration officials and a clerk-stenographer rather than three immigration officials, as allegedly required by law, and in that the Board was not composed of hearing examiners appointed in conformity with the Administrative Procedure Act, and (2)

[1a] Petitioner was released on bond and still remains at large under that bond.

the Board's finding that he was not Wing's blood son was not supported by any evidence whatsoever.

Respondents' answer alleged that the Board of Special Inquiry was properly constituted and that such boards were not required to be appointed in conformity with the Administrative Procedure Act. It denied that there was substantial evidence introduced at the hearing that petitioner was Wing's blood son. It further denied that the complaint stated a cause of action upon which relief might be granted or that the court had jurisdiction over the subject matter. (R. 4–5.)

The District Court dismissed petitioner's action (R. 10–11), issuing a memorandum opinion, findings of fact and conclusions of law (R. 7–10). It held that the Declaratory Judgment Act (28 U. S. C. 2201) allowed judicial review of the administrative determination here involved, such review to be limited to a determination of whether the statutory requirements had been met and whether there had been abuse of discretion in making the determination in question. The court found that the statutory requirements had been met and that the Board was properly constituted; that in any event, petitioner had waived any objection to the Board's composition when he failed to object at the time of the hearing; that petitioner had received a fair hearing; and that the

evidence adduced at the hearing amply supported the Board's determination. (R. 10.) On appeal,[2] the Court of Appeals unanimously affirmed (R. 16). Agreeing with the lower court's findings, it further said (R. 15):

> The recent decision of the Supreme Court in *Heikkila* v. *Barber*, 345 U. S. 229 (March 16, 1953), may suggest a serious question as to the right of judicial review of an exclusion order except by the limited process of habeas corpus. However, as appellant has been accorded the benefit of a full review and questions concerning validity of the administrative proceedings have been considered and resolved against him, it is unnecessary for us to consider the question now.

The elements of the record relating to the membership of the Board of Inquiry, and to the evidence concerning petitioner's claim of right to enter the United States, are set forth in connection with the discussion of these questions, *infra*, pp. 32–35, 37–38, 42–45.[3]

---

[2] On May 1, 1953, after the April 17, 1953, argument in the Court of Appeals, petitioner filed a motion for reconsideration before the Board of Immigration Appeals. The Board affirmed its previous orders on August 11, 1953, after the July 2, 1953, judgment of the Court of Appeals, and after the petition for a writ of certiorari had been filed on August 7, 1953.

[3] The printed record in this Court consists only of the pleadings and the opinions of the courts below. Although petitioner has lodged a copy of the immigration file in his case with the Clerk of this Court, petitioner apparently felt no need to reproduce the file or any of its contents, including

SUMMARY OF ARGUMENT

I

Inasmuch as petitioner raised, essentially, only one question in his petition—whether the judgment of the District Court should be vacated and his complaint dismissed for want of jurisdiction—that is the only question before the Court. There is no basis for any argument that other questions were preserved by the petition or were raised by the respondents' memorandum in opposition. Accordingly, the additional five questions which petitioner attempts to inject into this case via his brief are not before the Court, and should not be reached, no matter what this Court's disposition of the question the petition actually raised.

II

A. The respondents have consistently taken the position that the petitioner's complaint should be dismissed for want of jurisdiction.

B. Whether a court should consider jurisdiction before the merits presents difficult policy considerations. Although the general rule is that jurisdiction should be considered first, the fact is that for a variety of reasons, federal courts sometimes do consider the merits without deciding jurisdiction. However, in this case, where a re-

---

the minutes of his hearing. He has, however, in his brief, referred to the contents of that file in presenting the additional issues. Br. 23, 39–40. Accordingly, where necessary we shall make like reference.

cent decision of this Court had unequivocally established that the District Court had no jurisdiction over the petitioner's complaint, and that fact was called to the attention of the Court of Appeals, the better procedure would have been for the court to consider the jurisdictional question before reaching the merits.

C. *Heikkila* v. *Barber,* 345 U. S. 229, clearly establishes that district courts have no jurisdiction under the Immigration Act of 1917, the Declaratory Judgment Act, or the Administrative Procedure Act to review exclusion orders in a declaratory judgment action.

D. (1) Although parties are generally estopped from assigning as errors contentions of their own which the courts have adopted, this principle does not apply where the issues are "jurisdictional." The constitutional and statutory restrictions on the jurisdiction of a federal court represent overriding considerations which the whims or mistakes of the parties cannot be allowed to affect. Thus, questions such as diversity of citizenship, jurisdictional amount, case or controversy, proper federal forum, nonreviewability of administrative action and sovereign immunity from suit may not be "waived" by the action or inaction of the parties. On the other hand, a party does lose the right, if it is not timely asserted, to challenge jurisdiction over the proper venue, the impropriety of the removal of a cause to a federal court,

and similar questions which do not represent such important considerations of policy.

(2) Here, the only substantial argument which might be made that the petitioner is estopped from contesting the jurisdiction of the District Court over the declaratory judgment action would be based upon an assimilation of this question to one of venue, as in the removal cases. But *Ahrens* v. *Clark,* 335 U. S. 188, is an insurmountable obstacle to such an argument. There, the petitioners sought relief by habeas corpus in the District of Columbia from an outstanding deportation order, although they were detained in the Southern District of New York. The Government was willing to waive any question whether the District Court had jurisdiction over such an action, but this Court refused to accept the waiver, holding that habeas corpus would lie only in the district of detention. In like manner here, the proper action to review the order of exclusion would be by writ of habeas corpus where petitioner might be detained. Thus, in light of *Ahrens* and *Heikkila,* it is clear that this action could not, under any theory, have been brought in the District of Columbia. Accordingly, the Court of Appeals should have vacated the judgment of the District Court and ordered the complaint dismissed for want of jurisdiction.

III

Without retreating from our position that no other issue is properly before the Court, we shall

discuss briefly the other contentions petitioner has for the first time raised in his brief.

A. There is no merit to the argument that *Heikkila* v. *Barber* should be overruled. In the first place, petitioner presents nothing new which was not considered by this Court in that case. The issues decided in *Heikkila* were argued not once, but twice, in the past Term, and *Heikkila* itself was decided less than one year ago. Moreover, future exclusion or deportation proceedings will be controlled by the Immigration and Nationality Act of 1952 and not by the Immigration Act of 1917.

B. Petitioner is precluded from contending that the Board of Special Inquiry was improperly constituted in view of his failure to raise that contention before the board itself. *United States* v. *Tucker Truck Lines, Inc.*, 344 U. S. 33; *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103. Petitioner's belated motion for reconsideration before the Board of Immigration Appeals and its opinion on that motion does not advance his cause. For, even if that opinion were to be considered as properly before this Court, the fact remains that the proper place to have made his objection to the composition of the Board of Special Inquiry was to that board. Adverse parties to administrative proceedings will be forced to prepare and try completely unnecessary litigation if objections to the composition

of the board or examiner which hears the evidence are not required to be made at the time of the actual hearing, when an error can still be corrected.

C. That the Board of Special Inquiry had as one of its members a clerk-stenographer is of no significance. The statute (8 U. S. C. 153) gives the Commissioner of Immigration and Naturalization, with the approval of the Attorney General. the power to designate the Board members. And the regulations promulgated under that authority expressly provide that persons designated as qualified may include "[a]ll other employees * * * whose supervisory officers assign to them the duty of acting as secretaries of such boards." 8 C. F. R. 60.29. Every court which has considered the question has approved the practice of designating clerks and stenographers to sit on such boards. Congress, by its failure to amend the statute until 1952, even though this practice was repeatedly called to its attention beginning in 1911, must be deemed to have accepted such an interpretation as proper during the intervening years.

D. Petitioner's contention that the change of the Board's personnel rendered the hearing unfair is without merit. The lower courts have uniformly held that such changes do not invalidate the hearings, and where, as here, the new members are completely familiar with all the

evidence in the record, which shows beyond dispute that petitioner's testimony was entitled to no weight at all, there is no prejudice from the change.

E. Section 7 (a) of the Administrative Procedure Act which pertains to the designation of hearing officers, provides that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." Inasmuch as the Boards of Special Inquiry are specifically established by Section 17 of the Immigration Act of 1917 (8 U. S. C. 153), exclusion proceedings are, as the lower courts have unanimously held, exempt from the requirements of the Administrative Procedure Act. Both the legislative history and the purpose of Section 7 (a) accord with this construction.

Petitioner's argument that the Board of Special Inquiry violated the separation of functions requirements of Section 5 (c) of the Administrative Procedure Act, is equally without merit. For the above exemption of 7 (a) clearly extends to the applicability of Section 5 (c).

F. There is no merit to petitioner's contention that his hearing was unfair or that the decision was not supported by evidence. Both courts below examined the record carefully for these alleged errors and found none. An independent examination of the record leads to the same conclusion.

ARGUMENT

Although in his brief petitioner has attempted to add several completely unrelated matters to the questions presented by his petition, there is only one question properly before this Court for its consideration: whether the Court of Appeals should have vacated the judgment of the District Court with instructions to dismiss the petitioner's complaint for want of jurisdiction rather than treating the issues on the merits. On this single issue the respondents agree that the answer is in the affirmative. If the other issues petitioner belatedly presents were to be reached in this proceeding, the decision of the court below should be affirmed.

I

THE ONLY ISSUE BEFORE THIS COURT IS WHETHER THE JUDGMENT OF THE COURT BELOW SHOULD BE VACATED AND THE CASE REMANDED TO THE DISTRICT COURT FOR A DISMISSAL OF THE COMPLAINT FOR WANT OF JURISDICTION

The petition for a writ of certiorari did not challenge the validity of the exclusion determination by the immigration Board of Special Inquiry nor the judgment of the court below in its affirmation of the substance or the merits of that determination. Petitioner's sole contention (Pet. 2, 5)

was that, in the light of this Court's decision in *Heikkila* v. *Barber*, 345 U. S. 229 (rendered after the judgment of the District Court), the Court of Appeals did not have jurisdiction to review the merits of the exclusion determination, but should have dismissed the action solely on the basis of lack of jurisdiction, rather than affirming the judgment of dismissal upon the merits.

The five-page Memorandum in Opposition filed by the respondents did not take issue with the contention that the courts below did not have jurisdiction over the merits of the complaint. Rather, it pointed to those considerations which, in our view, were factors demonstrating that the petition did not merit review by this Court: the fact that it was petitioner who had invoked the declaratory judgment avenue of relief and that petitioner had obtained a review of the outstanding exclusion order which was at least as extensive as, if not more so, than that which he would be able to obtain by a writ of habeas corpus. "In these circumstances, we [saw] no need to disturb the decision of court below." (Memorandum in Opposition, p. 5.)[4]

There was no hint in the petition that petitioner would attempt to urge before this Court any ques-

[4] Petitioner misreads that Memorandum when he suggests (Br. 22) that "the Government * * * devoted itself exclusively to the merits, * * * which may otherwise be before the Court by reason of the Government's argument in opposition to certiorari." The merits of the issues petitioner now attempts to raise were not argued in that Memorandum.

tion other than those expressly presented by the petition.[5] It is beyond dispute that this Court will consider only those questions presented by the petition for a writ of certiorari. See, *e. g., General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175, 177–179; *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 357, n. 2. Of course, this Court has power to notice "plain error not assigned or specified" (Rule 27 (6)), but petitioner's contention that *Heikkila* v. *Barber,* a case decided less than five months before the petition was filed, should be overruled—a condition precedent to this Court's reaching the remaining questions on the merits which the petitioner has added in his brief[6]—scarcely comes within the "plain error" category. Accordingly, the respondents strenuously urge that no question other than the jurisdictional issue is before the Court.

---

[5] The Questions Presented were limited to the aforesaid jurisdictional questions. There was no Specification of Errors included in the petition. The Argument discussed only the jurisdictional issue.

[6] Petitioner devotes less than three printed pages of his 37-page Argument to the questions presented by the petition. The remaining 34 pages deal exclusively with the new questions.

II

THE JUDGMENT OF THE COURTS BELOW SHOULD BE VACATED AND THE CASE REMANDED TO THE DISTRICT COURT WITH INSTRUCTIONS TO DISMISS THE COMPLAINT FOR WANT OF JURISDICTION

A. THE POSITION OF THE RESPONDENTS

It has consistently been the position of the respondents, when the issue was properly joined, that the complaint should be dismissed for want of jurisdiction without passing on the merits of the case. This was the respondents' position in the District Court. Motion to Dismiss Complaint, pp. 9–10, United States District Court for the District of Columbia, Civil Action No. 276–50. It was likewise the position of the respondents in the Court of Appeals. Supplemental Brief for Appellee, pp. 2–3, 5–14, C. A. D. C. No. 11,417. As indicated, the Memorandum in Opposition to the Petition was not inconsistent with this position, and, after the petition had been granted, the Acting Solicitor General filed a letter with the Clerk of this Court stating that the respondents agreed with the petitioner's views on the only question presented by the petition, that the judgment should be vacated and the complaint dismissed for lack of jurisdiction.[7]

[7] The letter further suggested that the Court might wish to dispense with oral argument.

The question whether a court must in every case consider jurisdiction before it reaches the merits of a given controversy presents difficult policy considerations. It is true that the standard formulation of the principle is that "The first duty of the [federal] court is to make sure that jurisdiction exists."[*] See *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379; *Treines* v. *Sunshine Mining Co.,* 308 U. S. 66, 70. Certainly a court acting in orderly and logical fashion will first determine if it has jurisdiction before proceeding to other issues. It is, however, also true that as a practical matter federal courts sometimes do entertain cases on the merits without considering their jurisdiction to do so. There are doubtlessly a number of decisions on the merits spread throughout the federal reports where it could be shown that a decision on the jurisdiction would have required the court to dismiss the suit. Some of

[*] Hart and Wechsler, *The Federal Courts and the Federal System* (1953), p. 719. The text goes on:

> If the record fails to disclose a basis for federal jurisdiction, the court not only will but must refuse to proceed further with the determination of the merits of the controversy unless the failure can be cured. This is true whether the case is at the trial stage or the appellate stage, and whether the defect is called to the court's attention "by suggestion of the parties or otherwise." Probably it would be possible to fill the rest of this book [some 700 pages] with citations and thumbnail abstracts of case illustrating the application of this principle.

these decisions can be explained by the court's desire to avoid difficult jurisdictional problems where the merits are relatively simple. See, *e. g., Brooks* v. *Dewar,* 313 U. S. 354, 359–360; cf. *Secretary of Agriculture* v. *Central Roig Co.,* 338 U. S. 604, 619–620. Or, where a court recognizes the existence of the problem, it may, as did the court below, wish to terminate the litigation without prolongation by subsequent actions, provided that no unfairness to the litigants will result from such a determination.

In this case, however, this Court had decided the jurisdictional question without equivocation in *Heikkila,* and the issue had been called to the attention of the Court of Appeals. There was thus no difficult or open question of jurisdiction by the time the case reached that court. In these circumstances, despite the undesirability of relitigating matters which have already been decided and thus prolonging the litigation unnecessarily, we are of the view that there was no sound reason for the court below not to reach and dispose of the case on the jurisdictional issue before coming to the merits.

C. HEIKKILA *v.* BARBER

Heikkila v. *Barber,* 345 U. S. 229, is fully dispositive of the jurisdiction of the lower courts to decide this kind of case on a proceeding for injunction or declaratory judgment. There, the opinion of this court points out that, prior to the

Administrative Procedure Act, habeas corpus was the only remedy by which deportation orders could be challenged in the courts, and that attempts to use injunctions, declaratory judgments, and other types of challenge had been consistently rejected (*id.* at 230). In determining whether the word "final," as to the decisions of the Attorney General, would preclude judicial review and thus make the Administrative Procedure Act inapplicable, reference was made to the long history of the word "final," both in statutes and in decisions of this Court, and it was concluded (*id.* at 235):

> * * * Clearer evidence that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. Whatever view be taken as to the breadth of § 10 of the Administrative Procedure Act, the first exception to that section applies to the case before us. The result is that appellant's rights were not enlarged by that Act. Now, as before, he may attack a deportation order only by habeas corpus.

Moreover, the Court's review of the history included instances of exclusion as well as deportation; the reasoning used to support the conclusion that the decision of the Attorney General is nonreviewable in a deportation case applies *a*

fortiori to a case involving an exclusion proceeding (*id.* at 233–234).[9]

D. WAIVER OR ESTOPPEL

Inasmuch as *Heikkila* v. *Barber, supra,* so clearly vitiates the basis of the jurisdiction assumed by the District Court, the only possible method of sustaining the judgment of the court below would be by an argument of waiver or estoppel based upon the fact that it was the petitioner who invoked the jurisdiction of the District Court for declaratory relief and that he cannot be heard now to contest that jurisdiction. Although the respondents thought it entirely proper to suggest this fact as a reason for urging that this Court, in the exercise of its discretion, deny certiorari to the petitioner, it does not lead to an affirmance of the judgment below on the merits.

(1) Any general theory of waiver or estoppel is, in the final analysis, based upon the evident unfairness of permitting one party to switch positions in the middle of litigation, when it is to his advantage to do so. Thus, there is usually little judicial hesitancy in preventing a litigant

[9] Nor do the decisions in *Perkins* v. *Elg*, 307 U. S. 325, and *McGrath* v. *Kristensen*, 340 U. S. 162, afford a basis for judicial review. *Heikkila* v. *Barber*, 345 U. S. 229, 236–237.

from arguing that it was error for a court to have accepted one of his own contentions. Cf. *Johnson* v. *United States,* 318 U. S. 189; *Boyd* v. *United States,* 271 U. S. 104.

This general and reasonable rule has not been applied where the issues are "jurisdictional." Federal courts are circumscribed by the Constitution and the federal statutes which give them jurisdiction. Important policy bases underlie these restrictions. For example, if it were not for this circumscription, the jurisdiction of federal courts (with few exceptions) would coincide with that of the state courts. For the parties to ignore the prescribed limitations and to invoke federal jurisdiction is to introduce into the federal judicial system matters reserved to the states, creating a problem in federalism. See *Healy* v. *Ratta,* 292 U. S. 263, 269–270. Thus, the doctrine has been developed that the requirement of diversity of citizenship cannot be waived by the parties;[10] and the same principle applies to the requirement of jurisdictional amount.[11]

Also fundamental to the jurisdiction of a federal court is the Constitutional command that

---

[10] *Capron* v. *Van Noorden,* 2 Cranch 126; *Grace* v. *American Central Insurance Co.,* 109 U. S. 278, 283; *Robertson* v. *Cease,* 97 U. S. 646; *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379; *Mitchell* v. *Maurer,* 293 U. S. 237; *American Fire & Casualty Co.* v. *Finn,* 341 U. S. 6.

[11] *McNutt* v. *General Motors Acceptance Corp.,* 298 U. S. 178, 184; *North Pacific Steamship Co.* v. *Soley,* 257 U. S. 216, 221; *Wetmore* v. *Rymer,* 169 U. S. 115, 120.

there be a "case or controversy." This, too, cannot be waived.[12] Nor can there be a waiver of the statutory requirements that a particular type of case be tried in one federal forum rather than another, where Congress has distinguished between the two fora with particular ends in mind.[13] And of course where no review of particular administrative orders has been provided by Congress the failure of the administrative agency to contest jurisdiction does not give a federal court such jurisdiction to review.[14]

Another fundamental concept is that of the sovereign immunity of the United States from suit. This immunity does not depend upon the mistakes or choice of litigation strategy of any one Government attorney, but must ultimately depend upon the degree to which Congress has relaxed the immunity.[15]

This is not to say that there are no situations where the parties are not estopped to contest questions normally denominated "jurisdictional." Thus, jurisdictional limitations which are based

---

[12] *McGrath* v. *Kristensen*, 340 U. S. 162, 167.

[13] *Ahrens* v. *Clark*, 335 U. S. 188.

[14] *United States* v. *Griffin*, 303 U. S. 226; *United States* v. *Corrick*, 298 U. S. 435; cf. *443 Cans of Egg Product*, 226 U. S. 172.

[15] *United States* v. *Shaw*, 309 U. S. 495, 500–501; *United States* v. *United States Fidelity Co.*, 309 U. S. 506, 513; *Finn* v. *United States*, 123 U. S. 227; *Case* v. *Terrell*, 11 Wall. 199.

on the convenience of the parties; *e. g.*, jurisdiction over the person [16] or venue,[17] may be waived. Further, collateral attacks upon judgments which were entered without jurisdiction are severely limited and do not lie to the same extent as do attacks which could be made upon a direct appeal.[18] Moreover, it cannot be gainsaid that in particular cases the courts have estopped a contesting of jurisdiction by reconstructing the action in order to preserve the jurisdiction.[19]

In sum, this Court has held that there exist large areas of federal jurisdiction which are controlled by such overriding policy considerations that they cannot be allowed to depend upon the whims of the particular litigants before the courts. There do exist other areas which do not require such rigid restraint, but, generally, those cases,

---

[16] *Alexander* v. *Hillman*, 296 U. S. 222.

[17] *Ex parte Schollenberger*, 96 U. S. 369; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167–168.

[18] See, generally, Boskey, *Jurisdiction and Collateral Attack*, 40 Col. L. Rev. 1006.

[19] *E. g.*, the removal cases, see *infra*, pp. 24–27; *Ex parte Endo*, 323 U. S. 283 (removal of an applicant for habeas corpus from the district in which the petition was filed does not destroy jurisdiction over the cause); cf. *Morris* v. *Gilmer*, 129 U. S. 315 (removal of a party from a state to defeat jurisdiction unsuccessful).

Another category of cases where a party may be estopped from contesting jurisdiction is that where the wrong relief is sought, although the court has jurisdiction over the parties in other respects. *Mercelis* v. *Wilson*, 235 U. S. 579; *Beyer* v. *LeFevre*, 186 U. S. 114. Cf. *DiGiovanni* v. *Camden Fire Insurance Assn.*, 296 U. S. 64.

which have held that the litigant who invoked jurisdiction could not subsequently contest it, can be rationalized by the relatively minor importance of the facet of jurisdiction involved.

(2) It is against this background that this case must be approached. This Court has held that there is no jurisdiction in federal district courts over declaratory judgments to test the validity of deportation or exclusion orders. It might be argued, however, that since habeas corpus is the proper remedy, and since the elements are essentially the same (but cf. *Heikkila* v. *Barber*, 345 U. S. at 236–237), the mere mislabeling of the form of action should not be considered jurisdictional.

But this argument runs afoul of *Ahrens* v. *Clark*, 335 U. S. 188. There, the petition for writ of habeas corpus was filed in the District Court for the District of Columbia, although the petitioners were confined in the Southern District of New York. The respondent Attorney General was willing to waive the jurisdictional question, in effect assimilating the issue to one of venue. This Court rejected that contention, stating (335 U. S. at 193):

> Respondent is willing to waive the point, so that we may make a decision on the merits. But the restriction is one which Congress has placed on the power of the District Court to act. Hence it may not be

waived by the parties. *United States* v. *Griffin*, 303 U. S. 226, 229.

Accordingly, it seems clear to us that under *Ahrens* the parties cannot waive the jurisdictional limitations of the District Court over this type of attempt to seek review of exclusion or deportation orders, and if the point cannot be waived voluntarily it presumably cannot be waived involuntarily on any theory of estoppel.

It is true that in a somewhat analogous situation, the decisions have sustained unauthorized removals from state to federal courts, where the removing party has subsequently challenged the propriety of the removal. This result has been reached, not by the application of the statutory criteria of removal, but by treating the removal as if it were an original action in the federal court, and then by determining whether there would have been a basis for jurisdiction by reason of the nature of the subject matter and diverse parties, and the like.[20]

---

[20] In *Baggs* v. *Martin*, 179 U. S. 206, where the receiver of a railroad removed an accident claim from the state court on grounds which "may" not have been "well founded" (*id.* at 208), he was not to be heard to object, since the federal court had jurisdiction of the railroad property and thus did not acquire jurisdiction solely by the receiver's consent (*id.* at 209). In *Handley-Mack Co.* v. *Godchaux Sugar Co.*, 2 F. 2d 435 (C. A. 6), removal of a breach of contract action by the defendant was held improper because the defendant was a resident of the state from which he obtained removal; but the court relied upon the fact that this would not have barred an original action by the plaintiff, who was a resident

The most recent and definitive case on this issue is *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6. There, this Court spelled out the limits of this sustaining of judgments by a species of estoppel. The removal there was improper because of non-separability of the claims sued upon against two fire insurance companies and their resident agent. The Court there stated (*id.* at 16–18):

> There are cases which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case. This circumstance was relied

---

of a different state (*id.* at 436). In *Bailey* v. *Texas Co.*, 47 F. 2d 153 (C. A. 2), the removal by defendant was improper because the action was not between citizens of different states but between an alien and citizen. But since the court would have had jurisdiction of an original suit between an alien and citizen, jurisdiction was sustained (*id.* at 155). In *Toledo, St. L. & W. R. Co.* v. *Perenchio*, 205 Fed. 472 (C. A. 7), one of two defendant companies removed an action for personal injury, claiming a separable controversy. Upon dismissal of the other defendant and judgment for plaintiff, defendant claimed improper removal on the ground that the controversy was actually inseparable. Jurisdiction was sustained upon the ground of diversity of citizenship (*id.* at 474–476).

BLEED THROUGH POOR COPY

upon as the foundation of the holdings. The defendant who had removed the action was held to be estopped from protesting that there was no right to removal. Since the federal court could have had jurisdiction originally, the estoppel did not endow it with a jurisdiction it could not possess.

In this case, however, the District Court would not have had original jurisdiction of the suit, as first stated in the complaint, because of the presence on each side of a citizen of Texas. 28 U. S. C. § 1332. The posture of this case even at the time of judgment also barred federal jurisdiction. A Texas citizen was and remained a party defendant. * * * By this decree the merits of the litigation against Reiss were finally adjudicated. The request of respondent to dismiss Reiss after the judgment was not acted upon by the trial court.

The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them.[21]

[21] Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Minton concurred, dissented, observing that the

It would thus appear that for this Court to sustain jurisdiction in the instant case would require that the action be treated not only as one applying for a writ of habeas corpus but also as having been brought in the district in which petitioner might be detained. Merely stating this proposition demonstrates that the removal analogy cannot be pressed so far as to include this case. The fact is that this action could not have been instituted in the District Court for the District of Columbia, no matter what its label. To hold that the petitioner here had waived his right to raise the jurisdictional issue would necessarily require an overruling of *Ahrens* v. *Clark*.[22]

In sum, the Government is of the view that, in accord with long-established views of the limitations of federal jurisdiction, and particularly in the light of *Heikkila* v. *Barber* and *Ahrens* v. *Clark*, the District Court had no jurisdiction in this case; that the Court of Appeals should first have examined that jurisdiction; and that the Court of Appeals should have concluded that the

---

Texas defendant and the other nonresident defendant were dismissed from the case.

[22] It would also raise serious questions as to whether an indispensable party was before the court. Respondents here are the Attorney General and the Commissioner of Immigra- Accordingly, it is highly doubtful that the present respondents are the proper parties before the Court. See *Ahrens* v. *Clark*, 335 U. S. at 193.

tion. The writ of habeas corpus, however, normally must be directed to the applicant's custodian.

BLEED THROUGH POOR COPY

judgment of the District Court should be vacated with instructions to dismiss the complaint for want of jurisdiction.

III

EVEN IF THIS COURT WERE TO REACH THE ADDITIONAL QUESTIONS PRESENTED BY PETITIONER'S BRIEF, THE CONCLUSIONS OF THE COURT BELOW WOULD BE SUSTAINED

Although the remainder of our brief is in fact devoted to a consideration of those points petitioner has raised in his brief but which were not even remotely suggested by his petition, we wish to emphasize again that these issues are not properly before the Court.

A. HEIKKILA *v.* BARBER SHOULD NOT BE OVERRULED

Petitioner now requests this Court to overrule *Heikkila* v. *Barber,* decided March 1953, less than a year ago. This contention is, of course, completely inconsistent with the question presented in the petition, which was based upon the validity of *Heikkila.* Without conceding for an instant that petitioner should be permitted so to expand and, indeed, shift his grounds after obtaining review by this Court (see *supra,* pp. 12–14), the Government respectfully refers to the considerations and arguments presented in its briefs in *Heikkila* (No. 426, Oct. Term, 1952), and in *Martinez* v. *Neelly* (No. 218, Oct. Term, 1952). More im-

portant, the Government relies upon this Court's own considered decision in *Heikkila*.

Moreover, we see no reason for this Court to reconsider *Heikkila* at this time. Apart from the fact that the question decided therein was briefed and argued not once, but twice, within the last Term, the facts are, as petitioner concedes (Br. 7, 20), that this case is completely governed by the Immigration Act of 1917 and that future litigation will turn on the proper interpretation of the Immigration and Nationality Act of 1952 (66 Stat. 163, 8 U. S. C. A. 1101, *et seq.*), which became effective December 24, 1952. Whether that Act alters in any way the scope and method of judicial review is before this Court in *Brownell* v. *Rubinstein*, No. 300, this Term, certiorari granted, November 9, 1953.[23] Accordingly, it seems clear that if the arguments petitioner seeks to make should be heard at all, they can be best presented by the parties to that case, and not in a reconsideration of *Heikkila*.

Finally, petitioner's suggestion that *Heikkila* was erroneously decided is without merit. The principal argument in his brief to that effect is based upon his contention that courts have considered statutory matters as well as Constitutional arguments in reviewing deportation or exclusion orders. But, regardless of that allegation, it

[23] It is the position of the Government that no change was effected by the 1952 Act.

seems uncontrovertible that the exclusive method of review of such orders has been by habeas corpus and that the Act of 1917 has been consistently interpreted as precluding review except by habeas corpus. Inasmuch as Section 10 (a) of the Administrative Procedure Act (Appendix, *infra,* p. 48) provides for judicial review "[e]xcept so far as * * * statutes preclude judicial review," it seems clear, as this Court held in *Heikkila,* that the Administrative Procedure Act had no effect on the review of deportation and exclusion orders.

B. PETITIONER IS PRECLUDED FROM RAISING THE ISSUE OF IMPROPER COMPOSITION OF THE BOARD OF SPECIAL INQUIRY SINCE HE FAILED TO OBJECT BEFORE THAT BOARD

Although petitioner was represented by counsel who was "particularly experienced and competent in such matters" (R. 8), he failed to object to the composition of the Board of Special Inquiry until he lodged his complaint in the District Court (R. 2). This failure to assert the alleged improprieties during the course of the administrative proceedings, the time when they might have been considered by the administrative authorities and corrected—if correction were in order—precludes him from judicial consideration of the issues so belatedly presented. *United States* v. *Tucker Truck Lines,* 344 U. S. 33.[24]

[24] This doctrine is as applicable to administrative proceedings before the Immigration and Naturalization Service as it

Petitioner's contention (Br. 29–34) that the defect was "jurisdictional" has no more merit than did the similar contention in *Tucker*. Nor, despite petitioner's assertions to the contrary (Br. 32), must there be a statute or administrative regulation requiring that the objection be raised administratively before it can be deemed "waived." *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103.

It is true that by his belated motion to the Board of Immigration Appeals, after the argument in the Court of Appeals (*supra*, p. 5, n. 2), petitioner evidently sought to cure this defect *nunc pro tunc* and thereby avoid the *Tucker* doctrine. But, as this Court pointed out in *Tucker* (344 U. S. at 36), the objection should have been made before the administrative hearing tribunal (*i. e.*, the Board of Special Inquiry) and then again before the administrative appellate tribunal on its consideration of the appeal from the decision of that board. Despite the fact that the Board of Immigration Appeals appears to have decided that the Board of Special Inquiry was properly composed,[25] this fact should not

---

is to proceedings before other administrative agencies. See *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103, 113; *United States ex rel. Beck* v. *Neelly*, 202 F. 2d 221, 224 (C. A. 7), certiorari denied, 345 U. S. 997; *United States ex rel. Lombardo* v. *Bramblett*, 114 F. Supp. 183 (N. D. Ohio).

[25] In discussing its reasons for affirming its prior orders, the Board expressly referred to *Tucker* for the proposition

avail petitioner. For the correct course would be to require that objections to the qualifications of hearing examiners or administrative trial boards be made to those examiners or boards, rather than on appeal to the agency heads. Where the objection is made at the outset of the hearing when any error can be corrected, it may very well result—if it is well taken—in preventing the parties from going to the time and expense of conducting unnecessary hearings. Consideration for the unfairness inherent in subjecting the adverse parties in such proceedings to such expense should require that if the objection is not made to the board or examiner which actually hears the evidence, it is waived.

C. THE BOARD OF SPECIAL INQUIRY WAS NOT IMPROPERLY CONSTITUTED BY REASON OF THE FACT THAT ONE OF ITS MEMBERS WAS A CLERK-STENOGRAPHER

The record of the first day of hearing before the Board of Special Inquiry held on January 22, 1948, reflects that one of the three Board members, Luba Brondz, was also its Secretary.[26] The record does not show this member's official position in the Immigration and Naturalization Service, her Civil Service classification or title. When the hearing was resumed on February 24, 1949,

---

that "where no objection was made before the agency to noncompliance with the Administrative Procedure Act, the validity of that agency's order cannot be judicially attacked on that ground" (Pet. Br. 49).

[26] Immigration File, Minutes, p. 1. See *supra*, n. 3, pp. 5–6.

the record reflects that M. Louise Elliott replaced Miss Brondz as Board Member and Secretary.[27] Although Miss Elliott's official position, Civil Service classification or title do not appear at this point, it is noted that her certification of the record recites that she was, at least for this purpose, a clerk-stenographer.

The Act requires (8 U. S. C. 153, Appendix, *infra*, pp. 50–51) that the Board members be "immigrant officials * * * designate[d] as qualified to serve on such boards" by the Commissioner of Immigration and Naturalization with the approval of the Attorney General.[28] Persons designated as qualified and eligible by the Commissioner, with the approval of the Attorney General, include (*a*) immigrant inspectors, and

---

[27] As petitioner made no objection at the administrative hearing to the competency or qualification of either Secretary to sit as a member of the Board, the record before this Court is devoid of any evidence in this regard. The District Court found only (R. 9–10) that the Board of Special Inquiry was composed "of two immigration inspectors and the clerk-stenographer."

[28] That Congress contemplated that officials other than immigrant inspectors could sit on Boards of Special Inquiry is apparent from 8 U. S. C. 152 (Appendix, *infra*, pp. 49–50):

> * * * The inspection, other than the physical and mental examination, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, *except as hereinafter provided in regard to boards of special inquiry.* * * * [Emphasis added.]

"(*b*) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards * * *" 8 C. F. R. 60.29 (Appendix, *infra*. pp. 53–54).

Clearly, the two employees who sat successively as member and secretary of the Board of Special Inquiry in petitioner's case were within the ambit of this regulation. And the capacity of clerks and stenographers, designated as Secretaries of Boards of Special Inquiry, to sit as members of such Boards has been sustained by every court which has considered the question since it was first raised. See *United States ex rel. Minuto* v. *Reimer,* 83 F. 2d 166 (C. A. 2); *Dong Ying Fun* v. *Nagle,* 5 F. 2d 310 (C. A. 9); *Ex parte Hosaye Sakaguchi,* 277 Fed. 913 (C. A. 9); *Ex parte Momo Tomimatsu,* 232 Fed. 376 (N. D. Cal.).[29]

The fact is that there is no indication in the record that Miss Elliott did not have extensive

---

[29] Petitioner's contentions to the contrary are, generally, those which were considered and rejected by the Court of Appeals for the Second Circuit in *United States ex rel. Minuto* v. *Reimer, supra,* which we believe completely disposes of his argument. Petitioner's attempted contrast of the statutory restriction of Board membership to immigrant "officials" in 8 U. S. C. 153 with the designation of immigration officials, officers, and clerks in 8 U. S. C. 108 and 109 (Appendix, *infra,* p. 49) is without merit. For example, 8 U. S. C. 108 refers only to "immigration officials in charge of districts, ports, or stations." Certainly the Board's membership of Boards is not limited to such a particularized group.

experience as a member of Boards of Special Inquiry or that she consequently was not just as qualified to act as a member of the instant board as an immigrant inspector. Obviously, the fact that she functioned as a competent stenographer and reporter does not necessarily indicate that—as assumed gratuitously by petitioner—she had "no qualifications other than that possessed by the ordinary stenographer or clerical employee in the Immigration Service" (Pet. Br. 28).

Moreover, Section 17 of the Immigration Act of 1917, 8 U. S. C. 153, which prescribed the composition of the Board of Special Inquiry in petitioner's case, was a reenactment of Section 25 of the Immigration Act of February 20, 1907, 34 Stat. 898. Section 25 provided for a three-member board, selected from "immigrant officials." Under the 1907 Act, clerical employees were sometimes selected as Board members. See *Ex parte Momo Tomimatsu, supra.* The composition and qualifications of such Boards were the subjects of critical scrutiny, and as early as 1911 it was proposed by the Immigration Commission that Section 25 of the 1907 Act be amended to require that such Boards be composed of "men whose ability and training qualify them for the performance of judicial functions." S. Doc. 747, 61st Cong., 3d Sess., p. 46. This recommendation went unheeded when Congress, in enacting the 1917 Act, cast Section 17 thereof in the same

terms as Section 25 of the 1907 Act, S. Rep. 352, 64th Cong., 1st sess., p. 13. Other studies subsequently noted the presence of clerical personnel as Board members,[30] but it was not until 1952 that Congress, in the Immigration and Nationality Act, made any change at all,[31] Secs. 101 (b) (4), 235 (b), 236 (a) (Appendix, *infra*, pp. 52–53). As this case arose under the 1917 Act, there most certainly was no impropriety in the composition of the Board.

---

[30] See, for example, Van Vleck, *The Administrative Control of Aliens*, p. 46 (1932); S. Rep. 1515, 81st Cong., 2d sess., p. 618.

[31] The 1952 Act provides that a "special inquiry officer" is "any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings * * * required by this Act to be conducted by or before a special inquiry officer" (Sec. 101 (b) (4)); that every alien who may not appear eligible for admission "shall be detained for further inquiry to be conducted by a special inquiry officer" (Sec. 235 (b)); and that "A special inquiry officer shall conduct [exclusion] proceedings * * *" and "shall have authority in any case to determine whether an arriving alien * * * shall be allowed to enter or shall be excluded and deported" (Sec. 236 (a)); it further provides that "No special inquiry officer shall conduct a proceeding in any case" where he has participated in the investigation or prosecution, and "Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 235 and 287 (b), and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section." (*Ibid.*)

D. THE BOARD OF SPECIAL INQUIRY WAS NOT IMPROPERLY CONSTITUTED BY REASON OF CHANGE OF PERSONNEL, AND SUCH SUBSTITUTION DID NOT RENDER THE HEARING UNFAIR

The lower courts have uniformly held that changes in Board of Special Inquiry membership do not render the Board incompetent or make its hearings unfair. See *United States ex rel. Minuto* v. *Reimer, supra; Dong Ying Fun* v. *Nagle, supra; United States ex rel. Chin Cheung Nai* v. *Corsi,* 55 F. 2d 360 (S. D. N. Y.), affirmed, 64 F. 2d 1022 (C. A. 2); *Louie Lung Gooey* v. *Nagle,* 49 F. 2d 1016 (C. A. 9); *Hom Moon Ong* v. *Nagle,* 32 F. 2d 470 (C. A. 9).[32] And credibility was as much the essential issue in these cases as it was here. See, for example, *Louie Lung Gooey* v. *Nagle, supra.* And see *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, where this Court sustained an exclusion decision of a Board of Special Inquiry, two of whose members had never seen important pedigree witnesses whose depositions were considered. Where, as here, the new members were thoroughly familiar with the evidence which had already been adduced,[33] and the

[32] And see, with respect to proceedings before other administrative agencies, *Morgan* v. *United States,* 298 U. S. 468; *Empire Trails, Inc.* v. *United States,* 53 F. Supp. 373 (D. D. C.); *Visceglia* v. *United States,* 24 F. Supp. 355 (S. D. N. Y.); *Eastland Co.* v. *Federal Communications Commission,* 92 F. 2d 467 (C. A. D. C.), certiorari denied, 302 U. S. 735; *Twin City Milk Producers Assn.* v. *McNutt,* 122 F. 2d 564 (C. A. 8).

[33] The new Board members had of course familiarized themselves with the evidence at the first Board of Special

cold record so clearly indicates that the petitioner's testimony was just not credible,[34] no prejudice or unfairness results from a change in the composition of the Board.

E. PROCEEDINGS BEFORE THE BOARD OF SPECIAL INQUIRY WERE NOT GOVERNED BY THE ADMINISTRATIVE PROCEDURE ACT

Section 7 (a) of the Administrative Procedure Act (5 U. S. C. 1006 (a), Appendix, *infra*, p. 47), which pertains to the designation of hearing officers, provides that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." The lower federal courts accordingly have been unanimous in holding the exemption applicable to the designation of hearing officers in exclusion proceedings. See *United States ex rel. Saclarides* v. *Shaughnessy*, 180 F. 2d 687 (C. A. 2); *United States ex rel. Frisch* v. *Miller*, 181 F. 2d 360 (C. A. 5); *United States ex rel. Johnson* v. *Watkins*, 170 F. 2d 1009 (C. A. 2), reversed on other grounds *sub nom. United States ex rel. Johnson* v. *Shaughnessy*, 336 U. S. 806; *Wah* v. *Shaughnessy*, 190 F. 2d 488 (C. A. 2); *Ex parte Wong So Wan*, 82 F. Supp. 60 (N. D. Cal.).

In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, this Court held that deportation proceedings were

---

Inquiry hearing. Immigration File, Minutes, p. 24. See *supra*, n. 3, pp. 5–6.

[34] See *infra*, pp. 43–45.

not within the exemption under consideration. The Court stated, however (339 U. S. at 52):

> Section 7 (a) qualifies as presiding officers at hearings the agency and one or more of the members of the body comprising the agency, and *it also leaves untouched any others whose responsibilities and duties as hearing officers are established by* other statutory provision. * * * [Emphasis added.]

Exclusion proceedings are within the jurisdiction of Boards of Special Inquiry, whose members were established by just such another statutory provision; *viz,* Section 17 of the Immigration Act of 1917, 8 U. S. C. 153. That statute was not merely an authorization to appoint to Boards of Special Inquiry such immigration officials as may be designated by the Commissioner, but a statutory command that the Boards be so constituted. Clearly, therefore, Boards of Special Inquiry were "boards * * * specially provided for by or designated pursuant to statute" within the meaning of Section 7 (a), and consequently need not have been composed of examiners appointed in accordance with Section 11 of the Administrative Procedure Act, 5 U. S. C. 1010 (Appendix, *infra,* pp. 48–49).

The legislative history of Section 7 (a) accords with this construction and is consistent with the general policy of the Act, the object of which was to regulate procedures developed by the ad-

ministrative agencies in the exercise of their discretionary authority. Its sponsors affirmatively disclaimed any intention to disturb procedures theretofore specifically prescribed by Congress itself.[35] Indeed, any other construction of Section 7 (a) would render meaningless the excepting language, "* * * but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

The purpose of the exception to Section 7 (a) is "to preserve special statutory types of hearing officers who contribute something more than examiners could contribute." S. Doc. 248, 79th Cong., 2d Sess., p. 216. Petitioner contends, however, that Board of Special Inquiry members did not possess the expertise which prompted the exemption contained in Section 7 (a). He argues that immigrant inspectors were not required to have any special training as lawyers and asserts that the secretary who sat as a Board member merely had stenographic experience with the Immigration Service. But the expertise required for the examination of aliens applying for admission is not dependent on possession of a law degree. It is obvious that long experience in examining and

[35] See statements of Senator McCarran, Chairman of the Senate Judiciary Committee, in charge of the bill (S. 7). 92 Cong. Rec. 2152, 2154; S. Doc. 248, 79th Cong., 2d sess., pp. 307, 311.

dealing with aliens may endow an immigration employee with that peculiar proficiency to deal with such cases which is considered expertise. See *West Indian Co.* v. *Root,* 151 F. 2d 493, 497 (C. A. 3). Conceivably, Congress may have considered such experience a better qualification for membership on a Board of Special Inquiry than the capacity to perform judicial functions, when it rejected the proposal of the Immigration Commission in 1911 (*supra,* pp. 35–36).[38]

This analysis also disposes of petitioner's further contention—that the composition of the Board of Special Inquiry violated the separation of functions requirements of Section 5 (c) of the Administrative Procedure Act, 5 U. S. C. 1004 (c) (Appendix, *infra,* pp. 46–47). For, since "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers

[38] It was not the intention of Congress that deportation or exclusion proceedings should be governed by the hearing requirements of the Administrative Procedure Act. When this Court held, in *Wong Yang Sung, supra,* that the Act was applicable to deportation hearings, Congress promptly enacted legislation, 8 U. S. C., Supp. V, 155a (Appendix, *infra,* p. 51), which exempted not only deportation but also exclusion proceedings. As respects the latter, this action was evidently taken out of a superabundance of caution, since no court had then (or has yet) found the Administrative Procedure Act applicable to Boards of Special Inquiry. This legislative action may thus indicate a deep-rooted determination that exclusion proceedings be left in the form in which they were cast in the immigration statutes.

specially provided for by or designated pursuant to statute" (Section 7 (a)), it follows that the separation of functions provisions of Section 5 (c) are no more applicable to proceedings before Boards of Special Inquiry than are the examiner provisions of Sections 7 (a) and 11.[37]

F. THE ADMINISTRATIVE HEARING WAS FAIR AND THE DECISION WAS AMPLY SUPPORTED BY THE EVIDENCE

In support of his contention that the hearing was unfair, petitioner points to the fact that the Chairman of the Board of Special Inquiry dom-

[37] Moreover, Section 5 (c) provides that that subsection "shall not apply in determining applications for initial licenses." The term "license" is defined in Section 2 (e) of the same Act, 5 U. S. C. 1001 (e) (Appendix, *infra*, p. 46), as including "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." Seeking to enter the United States would seem to involve an application for a license within the broad and functional definition of Section 2 (e). The phrase "determining applications for initial licenses" in Section 5 (c) refers to the grant or denial of an application for a license, as opposed to such matters as the revocation or suspension of licenses. See Attorney General's Manual on the Administrative Procedure Act (1947), pp. 50–53. Accordingly, proceedings of Boards of Special Inquiry in determining whether aliens are entitled to be admitted into the United States would appear to involve the determination of "applications for initial licenses" and are therefore outside the scope of Section 5 (c).

On this score, petitioner errs when he asserts (Brief p. 37) that the initial permission to enter the United States is granted by an American Consul abroad. The visa issued by an American Consul to an alien abroad confers no right of entry, 8 U. S. C. 202 (g); *Chang Chan* v. *Nagle*, 268 U. S. 346, 352; *Sohaiby* v. *Savoretti*, 195 F. 2d 139, 140 (C. A. 5).

inated the hearing, asked all the questions, and expressed incredulity at some of petitioner's answers. However, the other members of the Board had ample opportunity to ask questions, if they wished. That they did not is not surprising, in view of the thoroughness with which the Chairman had already covered the ground. As for the Chairman's expressions of disbelief at some of petitioner's testimony, this, too, is not surprising in view of the contradictory nature of that testimony.

Impartial review of the record before the Board of Inquiry[38] will reflect that there was ample evidence to sustain the Board's fact-finding that petitioner's claimed relationship to his alleged father was not satisfactorily established. The Board's detailed discussion of the evidence reveals clearly the inadequacies of petitioner's proof.

Thus, the Board pointed out that there was no satisfactory evidence presented which showed that the alleged father of the petitioner had been in China at a time which would have made possible his paternity to the petitioner; that at no time prior to 1946 had the alleged father ever represented that he was married or had a son, and that, in fact, in both his Selective Service questionnaire and his 1941 income tax return, petitioner's alleged father had affirmatively indicated that he

[38] Immigration file, Minutes, pp. 1–25; see *supra*, n. 3, pp. 5–6.

was single. The Board further found that the testimony of the only witness called on petitioner's behalf was seriously inconsistent with that of the petitioner, in the description of the village in which petitioner claimed to have been born and lived, of the school in which he claimed to have been taught, and of persons who should have been known to him, and that testimony of this witness, rather than that of petitioner, was confirmed by collateral evidence. The Board also pointed out serious discrepancies between the answers which petitioner's alleged father had given to questions prior to the hearing and those of the petitioner himself. Thus, petitioner claimed that his family owned farmland in China, but petitioner's alleged father stated that the family had never owned any land. Petitioner's identification of his relatives was not only completely unsatisfactory, but was also inconsistent with that of his alleged father. Finally, petitioner's testimony as to correspondence with his alleged father was at material variance with that of his alleged father.[39] It might fairly be stated that every important phase of petitioner's testimony was shown to be without foundation, both by his own internal contradictions and by the testimony of his alleged father and that of the sole other supporting witness. As the Chairman summarized the evidence, "I do not believe that

[39] *Id.*, pp. 26–31.

the evidence presented and adduced has reasonably established the relationship claimed."

Both courts below were well warranted in concluding that the evidence adequately justified the Board's action.

CONCLUSION

For the reasons set forth in Sections I and II of this brief, the judgment of the court below should be vacated and the case remanded to the District Court with instructions to dismiss the complaint for want of jurisdiction.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
MURRAY L. SCHWARTZ,
Special Assistant to the Attorney General.
BEATRICE F. ROSENBERG,
J. F. BISHOP,
Attorneys.

L. PAUL WININGS,
General Counsel.
MAURICE A. ROBERTS,
Attorney,
Immigration and Naturalization Service.

NOVEMBER 1953.

APPENDIX

ADMINISTRATIVE PROCEDURE ACT, 60 STAT. 237

Sec. 2 (e), 5 U. S. C. 1001 (e):

"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Sec. 5 (c), 5 U. S. C. 1004 (c):

The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or ad-

vise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Sec. 7 (a), 5 U. S. C. 1006 (a):

In hearings which section 4 or 5 requires to be conducted pursuant to this section:

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

Sec. 10 (a), 5 U. S. C. 1009 (a):

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Sec. 11, 5 U. S. C. 1010:

Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other

agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

IMMIGRATION ACT OF 1917, AS AMENDED

8 U. S. C. 108:

The duties of immigration officials in charge of districts, ports, or stations shall be of an administrative character, to be prescribed in detail by regulations prepared under the direction or with the approval of the Attorney General.

8 U. S. C. 109:

Immigrant inspectors and other immigration officers, clerks, and employees shall be appointed and their compensation fixed and raised or decreased from time to time by the Attorney General, upon the recommendation of the Commissioner of Immigration and Naturalization and in accordance with the provisions of sections 632, 633, 635, 637, 638, and 640–542 of Title 5 * * *.

8 U. S. C. 152:

The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and

mental defects or diseases observed by said medical officers in any such alien; * * *. The inspection, other than the physical and mental examination, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry.

8 U. S. C. 153:

Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. When in the opinion of the Attorney General the maintenance of a permanent board of special inquiry for service at any sea or land border port is not warranted, regularly constituted boards may be detailed from other stations for

temporary service at such port, or, if that be impracticable, the Attorney General shall authorize the creation of boards of special inquiry by the immigration and naturalization officials in charge at such ports, and shall determine what Government officials or other persons shall be eligible for service on such boards. Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. * * * In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

8 U. S. C., Supp. V, 155a:

Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of [sections 5, 7, and 8 of the Administrative Procedure Act] sections 1004, 1006, and 1007 of Title 5.

8 U. S. C. 232:

Notwithstanding any of the several clauses of section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if other-

wise admissible under the immigration laws and if application for admission is made within three years of December 28, 1945, be admitted to the United States: * * *.

IMMIGRATION AND NATIONALITY ACT OF 1952, 66 STAT. 163

Sec. 101 (b) (4):

The term "special inquiry officer" means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.

Sec. 235 (b):

Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 273 (d), who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

Sec. 236 (a):

A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 235 shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 235 and 287 (b), and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry shall be kept.

8 C. F. R. 60.29:

Persons qualified as members of boards of special inquiry; oath.—In accordance

with the provisions of section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153), the following persons are hereby designated as qualified and determined to be eligible to serve on boards of special inquiry:

(a) Immigrant inspectors, including persons designated immigrant inspectors by § 60.27;

(b) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards for the purpose of keeping the complete permanent record of the proceedings and of all such testimony as may be produced; and

(c) Persons, other than employees of the Immigration and Naturalization Service but preferably Government employees, who are selected by an Immigration and Naturalization Service official in charge of a port where no permanent board of special inquiry is maintained and to which it is impracticable to detail a board from some other station. Such persons shall, before serving on a board of special inquiry, subscribe to an oath of office on Form I–266 before an immigrant inspector.

U. S. GOVERNMENT PRINTING OFFICE: 1983

No. 241. TOM WE SHUNG *v.* BROWNELL, ATTORNEY GENERAL, ET AL. Certiorari, 346 U. S. 854, to the United States Court of Appeals for the District of Columbia Circuit. Argued December 3–4, 1953. Decided December 7, 1953. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court with directions to dismiss the complaint. *Heikkila* v. *Barber,* 345 U. S. 229. MR. JUSTICE BLACK would re-

verse the judgment of the Court of Appeals. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON dissent.

Jack Wasserman argued the cause and filed a brief for petitioner. *Murray L. Schwartz* argued the cause for respondents. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg, J. F. Bishop, L. Paul Winings* and *Maurice A. Roberts.* Reported below: 93 U. S. App. D. C. —, 207 F. 2d 132.